TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 486

DANTE EDWARD GORI, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 15, 1960
CERTIORARI GRANTED DECEMBER 12, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 486

DANTE EDWARD GORI, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 24, 1961

[fol. A]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—against—

DANTE EDWARD GORI, Appellant.

On Appeal From the United States District Court for the Eastern District of New York

Appellant's Appendix—Filed January 11, 1960

[fol. 5]

Cr. No. (18 U.S.C., §659)

PAP:sl #90048

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

FRANKLIN OSBORNE CORBETT, DANTE EDWARD GORI,
Defendants.

SUPERSEDING INFORMATION

The United States Attorney Charges:

Count One

That on or about the 11th day of February, 1958, within the Eastern District of New York, the defendants, Franklin Osborne Corbett and Dante Edward Gori, did receive and have in their possession twenty-two (22 cases of women's and children's gloves, of a value of more than One Hundred Dollars ($100), which cases of women's and chil-

dren's gloves had been stolen while moving as part of and constituting an interstate shipment of freight; twenty-one (21) cases having been consigned by Dessy-Atco, 392 Fifth Avenue, New York, New York, to Julius Kayser & Company, Bangor, Pennsylvania, and one (1) case to Elias G. [fol. 6] Krupp, Inc., 308 Mills Street, El Paso, Texas, knowing the same to have been stolen.

Cornelius W. Wickersham, Jr., United States Attorney, Eastern District of New York.

PAP

Feb 3/58 Jan 19/59

[fol. 7]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. 45650.

UNITED STATES OF AMERICA,

—against—

DANTE EDWARD GORI, Defendant.

Excerpts from Testimony before Abruzzo, D.J. on February 4, 1959

Brooklyn, New York,
February 4, 1959.

Before: Honorable Matthew T. Abruzzo, U.S.D.J., and a Jury.

APPEARANCES:

Cornelius W. Wickersham, Jr., Esq., United States Attorney for the Eastern District of New York,

By: Peter Passalacqua, Esq., Assistant United States Attorney.

Nathan Gottesman, Esq., Attorney for Defendant.

• • • • • • •

[fol. 8] EXCERPT FROM GOVERNMENT'S OPENING

Mr. Passalacqua:

. . . . . .

in the morning of February 11th, 1958, these two gentlemen, Corbett and Gori were seen removing cartons of gloves from the basement of Corbett's house in Jamaica, by the F.B.I. agents.

The agents will be here to testify. You will hear their testimony as to the conversations that they had with the defendant, and Corbett, together, in the basement of this house.

. . . . . .

EXCERPT FROM DEFENDANT'S OPENING

Mr. Gottesman:

. . . . . .

There were two men apprehended, as told to you by the Federal attorney, at the time on February 11th, 1958.

The other defendant, he was made a defendant in this information, he pleaded guilty. The merchandise was found at his home in his premises.

The defendant claims, as far as he was concerned, he did not know that the property was stolen. If that is so, he cannot be found guilty in this particular case.

He was there. He admits being there. There was merchandise being loaded on the truck. He says that he was only helping this man for a consideration, just like you and I or anybody else would be earning a day's pay.

. . . . . .

Mr. Passalacqua: May I approach the Bench with Mr. Gottesman just for a moment?

The Court: I think you better not.

Mr. Passalacqua: I have a witness here—

[fol. 9] The Court: Don't make any statements, call your next witness.

. . . . . .

GEORGE STEWART, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Passalacqua:

* * * * * * * *

Q. Are you acquainted with alarm systems that are kept in commercial places?

The Court: I am not interested in that.

Mr. Gottesman: Objection.

The Court: What are you trying to prove, the truck was stolen?

Mr. Passalacqua: Yes.

The Court: You certainly must have better evidence than his investigation.

You got the evidence the truck that wasn't there and you found it some time—you found the truck abandoned two or three days later; and later you found the car.

How much more perfect do you want to make it? Do you want to go through the whole alphabet?

Mr. Passalacqua: That is why I want to approach the bench.

The Court: You know you shouldn't have to approach the bench on that at all. You should know what you are doing.

* * * * * * * *

[fol. 10]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOTICE OF MOTION TO DISMISS SUPERSEDING INFORMATION, ETC.—Filed February 26, 1959

Sir:

Please Take Notice that upon the annexed affidavit of Nathan Gottesman, sworn to the 26th day of February, 1959, and upon all the pleadings and proceedings heretofore

had herein, the undersigned will move this Court at a Special Term thereof at the Courthouse, Washington and Johnson Streets, Borough of Brooklyn, City and State of New York, on the 9th day of March, 1959, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to the Federal Rules of Procedure on the following grounds:

1. That the information does not state facts sufficient to constitute an offense against the United States of America.

2. That a mistrial has been declared of the offense charged therein in the case of the United States of America against Dante Edward Gori in the District Court of the Eastern District of New York, case number Cr. 45650., which mistrial has been declared on the 4th day of February, 1959 before Hon. Judge Matthew Abruzzo.

3. That the defendant, Dante Edward Gori, has been placed in double jeopardy pursuant to the law in that the [fol. 11] defendant was previously tried of this offense and a mistrial was declared by the presiding Justice due to no fault on the part of the defendant herein; and for such other, further and different relief as to this Court may seem just and proper:

Dated: Brooklyn, New York, February 26, 1959.

Yours, etc.

Nathan Gottesman, Attorney for Defendant Gori, Office & P.O. Address, 66 Court Street, Borough of Brooklyn, City of New York.

To:

Cornelius W. Wickersham, Jr., United States Attorney for the Eastern District of New York, Federal Building, 271 Washington Street, Brooklyn, N. Y.

[fol. 12]

AFFIDAVIT OF NATHAN GOTTESMAN IN SUPPORT OF MOTION TO DISMISS, ETC.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Nathan Gottesman, being duly sworn, deposes and says:

That he is the attorney for the defendant, Dante Edward Gori, and is familiar with all the proceedings had herein. That this affidavit is made for the purpose of preventing a second trial of the said defendant on the ground that it would be double jeopardy.

The defendant contends that a second trial would be in violation of the Fifth Amendment to the Constitution of the United States and also in violation of the Constitution of the State of New York, Article 1, Section 6, which provides:

> "No person shall be subject to be twice put in jeopardy for the same offense."

The information is as follows: That on or about the 11th day of February, 1958, within the Eastern District of New York, the defendants, Franklin Osborn Corbett and Dante Edward Gori, did receive and have in their possession twenty-two cases of womens' and childrens' gloves, of a value of more than $100.00, which cases of womens' and childrens' gloves had been stolen while moving as part of and constituting an interstate shipment of freight; twenty-one cases having been consigned by Dessy-Atco, 392 Fifth Avenue, New York, New York, to Julius Kayser & Com-[fol. 13] pany, Bangor, Pennsylvania, and one case to Elias G. Krupp, Inc., 308 Mills Street, El Paso, Texas, knowing the same to have been stolen.

That on the 9th day of January, 1959, the above named defendants duly executed waivers of indictment and an information was filed against them on the same day as set forth above in which they are charged with the violation of Title 18, United States Code, Section 659.

That on the 9th day of January, 1959, the defendants were arraigned before Hon. Judge Walter Bruchhausen

and the plea of not guilty was entered in behalf of the defendant, Dante Edward Gori, by your deponent as his attorney. The defendant, Franklin Osborn Corbett, entered a plea of guilty to the information.

The case against the defendant Gori was being tried on February 4, 1959 in this Court before Hon. Judge Matthew Abruzzo. A jury was selected and the attorneys representing both sides opened to the jury and the prosecution called their witnesses to the stand. Three of their witnesses had completed their testimony and while the prosecution's fourth witness was on the stand, Hon. Matthew Abruzzo, the presiding Judge of this Court, directed the Federal Attorney not to ask certain questions that he considered improper. The Federal Attorney did not take heed and persisted in asking the questions that the Court considered improper. That your deponent has in his possession the minutes of the trial herein certified by the Official Court Reporter of this Court containing one hundred seventeen pages which will be submitted to this Court upon the argument of the motion. Patrick Joseph Deery, a witness called on behalf of the Government, was examined and testified:

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

[fol. 14] Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn.

We observed his automobile at that time.

Q. Do you recall the type of automobile he had? A. Yes, he had a—

The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

Mr. Passalacqua: Your Honor, will you please allow me—

The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

Mr. Passalacqua: Your Honor, I think—please allow me.

The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

Mr. Passalacqua: Thank you.

Q. Did you observe the defendant on February 11, 1958?

The Court: Excluded.

Mr. Gottesman: Objection.

A. Yes.

Q. When did you see the defendant Gori for the first time?

Mr. Gottesman: Objection.

The Court: That has been already answered, February 10th.

[fol. 15] Q. When did you see him for the second time? A. February—

The Court: Excluded. You haven't even proved he saw him the second time.

Q. Did you see him after February 10, 1958? A. Yes, I did.

Q. Was he alone? A. He met another individual.

Q. Where did you see him on February 11th—

The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

Mr. Passalacqua: I am not referring—

The Court: That is exactly what you are going to lead this jury to believe.

These agents are helpless. They have got to—Juror No. 1, step out.

I declare a mistrial and I don't care whether the action is dismissed or not.

I declare a mistrial because of the conduct of the district attorney.

Mr. Passalacqua: I am not—

The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief, if he doesn't want to put any more cases on before me, it is alright with me.
That's all."

The Court then called a mistrial and withdrew a juror. This was done without the consent of the defendant and was not a condition brought about by the defendant's act. That the defendant at no time consented to declaring a mistrial.

A person has been put in jeopardy once if he has been convicted or acquitted, or if he has been placed on trial and [fol. 16] the jury drawn and the trial has been terminated arbitrarily by the court and without his consent before verdict.

People ex rel. Bullock v. Hayes, 215 N. Y. 172, 109 N. E. 77;
People v. Montlake, 184 App. Div. 578, 172 N. Y. S. 102;
People ex rel. Stabile v. Warden of City Prison of City of New York, 139 App. Div. 488, 124 N. Y. S. 341, affirmed 202 N. Y. 138, 95 N. E. 729;
People v. Goldfarb, 152 App. Div. 870, 128 N. Y. S. 62, affirmed 213 N. Y. 664, 107 N. E. 1083;
People v. Barrett, 2 Caines, 304, 2 Am. Dec. 239;
People ex rel. Jimerson v. Freiberg, 243 N. Y. S. 500, 137 Misc. 314.

And if he has once been in jeopardy on a charge of crime, he may not again be prosecuted for the same crime. Amendments to the Constitution of the United States, Article V; State Constitution, Article 1, Section 6.

That your deponent received a notice from the United States Attorney's Office, dated February 6, 1959, that the above entitled criminal action will be on the 2nd day of March, 1959 for trial at the District Court of the United States for the Eastern District of New York, to be held in Room 727, Federal Building, 271 Washington Street,

Brooklyn 1, New York, and signed by Cornelius W. Wickersham, Jr., United States Attorney.

Wherefore, your deponent respectfully requests that the second trial asked for by the United States Attorney's Office be considered double jeopardy and not be permitted as in violation of my client's constitutional rights.

(Sworn to by Nathan Gottesman on February 26, 1959.)

[fol. 17]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF PETER A. PASSALACQUA IN OPPOSITION TO MOTION—Filed March 13, 1959

State of New York,
County of Kings—ss.:

PETER A. PASSALACQUA, being duly sworn, says that he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.

This affidavit is submitted in opposition to a motion made by Nathan Gottesman, Esq., counsel for the defendant, Dante Edward Gori, to bar the retrial of the case against defendant Gori on the grounds of double jeopardy.

The facts are as follows: The defendant Gori and codefendant Corbett, are charged with possession of merchandise stolen from an interstate shipment, knowing the same to have been stolen. The codefendant Corbett entered a plea of guilty, and is now awaiting sentence.

The defendant Gori elected to go to trial and on February 4, 1959, a jury trial was commenced before Honorable Matthew T. Abruzzo.

The Government, by Assistant United States Attorney Peter A. Passalacqua, your deponent, called as its first witness one Max Bock whose testimony showed that he was the traffic manager of Desey-Atco, Inc., 392 Fifth Avenue, New York, New York, the owner of the stolen merchandise. That he prepared and issued the Bill of Lading covering

the stolen merchandise, and forwarded the Bill of Lading to the company's hired truckman, Lennie Parness.

[fol. 18] The Government then called its second witness, Mr. Parness, the truckman whose testimony showed that he picked up the subject merchandise at a pier in Brooklyn pursuant to the Bill of Lading, and finding that it was too late to make deliveries, drove his truck containing the merchandise into his garage. That this garage is located on 33rd Street, Brooklyn, and is considered a public garage having space for about 40 trucks.

It is the practice of this garage that after the last truck arrives the garage doors are closed, and the night man leaves the garage unattended until the early morning of the following day.

That on the following morning the witness returned to the garage and did not find his truck or merchandise. That a few days later his truck was found abandoned in Brooklyn, minus the merchandise.

The Government called its third witness, Special Agent of the F. B. I., George Stewart, who testified that on the day following the alleged theft of the truck, he examined the garage and adjacent property. That he noticed two sets of footprints in the snow and that these prints led to a trap door located on the roof of the garage.

That thereafter Special Agent Stewart continued testifying as follows:

Q. This trap door connected the roof to the garage proper itself?

A. Yes, sir, the Arrow Garage.

Q. How big a garage is this Arrow Garage?

A. It covers approximately a half block.

Q. Did you speak to the proprietor of the garage?

A. Yes, sir, I did.

Q. Did you ascertain whether or not—

Mr. Gottesman: I object and move to strike out all the testimony.

The Court: Yes. No conversation.

[fol. 19] Mr. Passalacqua: I am not going into the conversation, your Honor.

The Court: Well, you are going to ask him, did he ascertain a certain fact, and it would lead me to the conclusion that he was going—

Mr. Passalacqua: No. It is something he observed.

The Court: —to ascertain from the owner of the garage.

Mr. Passalacqua: Mr. Gottesman—

The Court: I don't want you to put anything in your question that might lead to a little piece of evidence to the jury. That is why I am trying to stop you.

Did you talk to the owner of the garage, yes or no?

The Witness: Yes, sir.

The Court: That's all.

Q. Are you acquainted with alarm systems that are kept in commercial places?

The Court: I am not interested in that.

Mr. Gottesman: Objection.

The Court: What are you trying to prove, the truck was stolen?

Mr. Passalacqua: Yes.

The Court: You certainly must have better evidence than his investigation.

You got the evidence the truck that wasn't there and you found it some time—you found the truck abandoned two or three days later; and later you found the car.

How much more perfect do you want to make it? Do you want to go through the whole alphabet?

Mr. Passalacqua: That is why I want to approach the bench.

[fol. 20] The Court: You know you shouldn't have to approach the bench on that at all. You should know what you are doing.

Mr. Passalacqua: Mr. Deery, please.

The Court: Is this another agent?

Mr. Passalacqua: Yes.

The Court: The same thing as the last?

Mr. Passalacqua: No.

(Witness excused.)

The Government then called for its fourth witness, Special Agent of the F. B. I., Patrick Deery, who testified as follows:

Q. Mr. Deery, how long have you been an agent of the F. B. I.?

A. Approximately eight and a half years.

Q. Do you know the defendant Gori?

A. Yes, sir, I do.

Q. Do you know the co-defendant Corbett, who is not on trial today?

A. Yes, sir.

Q. When did you see the defendant Gori for the first time?

A. February 10, 1958.

Q. At about what time?

A. Late in the evening, six o'clock.

The Court: Please keep your voice up.

The Witness: Yes, sir.

Q. Were you alone or were you with another agent?

A. No, I was with other agents.

Q. Where did you see the defendant?

A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn.

We observed his automobile at that time.

[fol. 21] Q. Do you recall the type of automobile he had?

A. Yes, he had a—

The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to.

Did you have a talk with him, yes or no?

Mr. Passalacqua: Your Honor, will please allow me—

The Court: No, I won't allow you to try your ease your way, because if you try it your way, we are going to have another mistrial.

Mr. Passalacqua: Your Honor, I think—please allow me—

The Court: I will give you the whole field. When I think you ought to stop, I will stop you.

Go ahead, you try your case your own way.

Mr. Passalacqua: Thank you.

Q. Did you observe the defendant on February 11, 1958?

The Court: Excluded.

Mr. Gottesman: Objection.

A. Yes.

Q. When did you see the defendant Gori for the first time?

Mr. Gottesman: Objection.

The Court: That has been already answered, February 10th.

Q. When did you see him for the second time? February—

The Court: Excluded. You haven't even proved he saw him the second time.

Q. Did you see him after February 10, 1958? Yes, I did. [fol. 22] Q. Was he alone? He met another individual.

Q. Where did you see him on February 11th—

The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year.

Now, I want this crime proved, not nine others.

Mr. Passalacqua: I am not referring—

The Court: That is exactly what you are going to lead this jury to believe.

These agents are helpless. They have got to—

Juror No. 1, step out.

I declare a mistrial and I don't care whether the action is dismissed or not.

I declare a mistrial because of the conduct of the district attorney.

Mr. Passalacqua: I am not—

The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is alright with me. That's all.

* * * * * * *

In this case the record shows that during the direct examination of Special Agents, Stewart and Deery, your deponent used a line of questioning tending to elicit what he considered proper, material and relevant facts leading to

the arrest of the defendants when found in possession of the stolen merchandise.

However, the Court felt that this line of questioning by your deponent, would perhaps elicit answers tending to show other crimes which the jury might infer were also committed by the defendants.

[fol. 23] From what has been shown, the Court, in its opinion, taking all the circumstances into consideration felt that the ends of justice may well have been defeated if the case had been allowed to be concluded..

Wherefore, your deponent respectfully requests that the motion to bar a second trial of the defendant Gori, and such further relief, be in all respects denied.

(Sworn to by Peter A. Passalacqua on March 13, 1959.)

[fol. 24]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Appearances:

Nathan Gottesman, Esq., Attorney for the Defendant Gori. For the Motion.

Cornelius W. Wickersham, Jr., Esq., United States Attorney,

By Peter A. Passalacqua, Esq., Assistant U. S. Attorney, In Opposition.

OPINION BY RAYFIEL, D.J. ON MOTION TO DISMISS SUPERSEDING INFORMATION, ETC.—March 26, 1959

Rayfiel, J.

This is a motion by the defendant, Dante Edward Gori, for an order dismissing the information herein on the following grounds:

(1) that the information does not state facts sufficient to constitute an offense against the United States,

(2) that the defendant has been placed in double jeopardy in that he was previously tried for the offense charged in said information and a mistrial was declared by the Court due to no fault on the part of the defendant.

The first ground urged is without merit. The information follows generally the language of the statute involved, [fol. 25] §659 of Title 18, U. S. Code, and complies in all respects with Rule 7(c) of the Federal Rules of Criminal Procedure.

As to the second ground urged by the defendant, the facts are as follows:—the trial of the case was commenced on February 4, 1959, and on that day, and during the presentation of the Government's case, the trial judge, apparently believing that certain questions asked of Government witnesses on direct examination were or might be prejudicial to the defendant, sua sponte exercised his prerogative and declared a mistrial. Though not sought by the defendant, the mistrial was obviously declared in his interest, and was not based on the kind of jeopardy which would bar a second trial herein. The Supreme Court, in the case of Wade vs. Hunter 336 U. S. 684, had occasion to discuss very fully the rule to be applied on this question, and Mr. Justice Black, stated at page 688 that "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in United States v. Perez, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and

prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:

'. . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to dis- [fol. 26] charge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .'

The rule announced in the Perez case has been the basis for all later decisions of this Court on double jeopardy. It attempts to lay down no rigid formula. *Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.*" (Emphasis added.)

The motion is in all respects denied. Submit order.

Dated: March 26, 1959

Leo F. Rayfiel, United States District Judge.

[fol. 36]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

JUDGMENT AND COMMITMENT—April 30, 1959

On this 30th day of April, 1959 came the attorney for the government and the defendant appeared in person and with counsel,

It Is Adjudged that the defendant has been convicted upon Verdict of guilty, of the offense of Violating T. 18, U.S.C., Section 659, in that on or about February 11, 1958, within the Eastern District of New York; defendant with another did receive and have in their possession 22 Cases of women's and children's gloves, valued at more than $100.00, which said cases had been stolen while moving as part of and constituting an interstate shipment of freight as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three and one-half (3½) years.

[fol. 37] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Walter Bruchhausen, United States District Judge.

[fol. 38]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ORDER APPEALED FROM

A motion having been made by the defendant, Dante Edward Gori, for an order dismissing the information herein on the following grounds:

(1) that the information does not state facts sufficient to constitute an offense against the United States,

(2) that the defendant has been placed in double jeopardy in that he was previously tried for the offense charged in said information and a mistrial was declared by the Court due to no fault on the part of the defendant, and said motion having been heard before the Honorable Leo F. Rayfiel on the 17th day of March 1959, and

Upon the motion papers herein submitted by Nathan Gottesman, Esq., in support of said motion, and Cornelius W. Wickersham, Jr., United States Attorney for the Eastern District of New York, by Peter A. Passalacqua, Assistant United States Attorney, in opposition thereto, and

Upon the opinion of the Court herein rendered on March 26, 1959, it is hereby

Ordered that the said motion be and the same hereby is in all respects denied.

Dated: Brooklyn, New York
July 22, 1959

Leo F. Rayfiel, U. S. D. J.

[fol. 45]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Argued March 11, 1960)

Docket No. 26048

UNITED STATES OF AMERICA, Appellee,

—v.—

DANTE EDWARD GORI, Defendant-Appellant.

OPINION—July 22, 1960

Before: Lumbard, Chief Judge, and Clark, Waterman, Moore, and Friendly, Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel and Walter Bruchhausen, Judges.

Dante Edward Gori appeals from the denial by Judge Rayfiel of his motion to dismiss, on his plea of former jeopardy, an information charging him with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659, and from his conviction of the offense charged after trial before Judge Bruchhausen and a jury. Affirmed.

[fol. 46] Jerome Lewis, Brooklyn, N. Y., for defendant-appellant.

Cornelius W. Wickersham, Jr., U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Margaret E. Millus, Asst. U. S. Atty., Brooklyn, N. Y., on the brief), for appellee.

Clark, Circuit Judge:

This appeal, based upon the defendant-appellant's plea of former jeopardy to avoid a criminal conviction, came for hearing before a panel of this court consisting of Judge Waterman and the writer from this Circuit and Judge Lewis of the Tenth Circuit, sitting with us pursuant to statutory designation. In conference the court was in disagreement, Judges Waterman and Lewis voting to reverse and the writer voting to affirm. Draft opinions reflecting this disagreement, together with the briefs, record, transcript, and appendix, were then circulated among the active judges, a majority of whom, believing that the case presented a general problem important to the administration of justice in this circuit, thereupon voted for disposition of the appeal *in banc*, 28 U. S. C. §46(c).[1] Four active judges having then voted to affirm, the writer was assigned to prepare an opinion reflecting this prevailing view. [fol. 47] The defendant was charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659. The trial got under way before Judge Abruzzo on February 4, 1959, after the declaration of a mistrial on the previous day.[2] From the opening by counsel it appeared that the defendant would not contest his receipt and possession of stolen goods on February 11, 1958, with the codefendant Corbett—who pleaded guilty—but would claim that he acted without knowledge

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[1] Although disagreeing with the conclusion of the panel majority, the writer did not vote for the *in banc* procedure. In his experience such procedure does not reconcile differences, but in fact accentuates them. Hence it should be reserved for clarifying issues otherwise presented ambiguously or in a one-sided fashion. Here the important issue seemed fully presented, and there was the added difficulty of superseding the judgment of a distinguished visitor who had graciously complied with our request for help. Though we have acted similarly in other cases, it appears not to be a settled practice in other circuits. See, e.g., *National Latex Products Co.* v. *Sun Rubber Co.*, 6 Cir., 276 F. 2d 167.

[2] No point was made on this appeal as to this mistrial, which appears to have been granted upon motion of defendant after associate defense counsel was observed talking with one of the jurors.

of their character and only as Corbett's hired employee. The Assistant United States Attorney attempted to prove this fairly simple case first by the testimony of the shipper's traffic manager, second by the truckman from whose truck the goods were stolen, and third by two FBI Special Agents investigating the theft. He ran into repeated difficulty, however, in part because of continuous formal objections by the defense, but even more by interference on the part of the trial judge, who repeatedly ordered the reframing of questions and otherwise took the conduct of the case away from him. The trial continued its rocky course throughout the morning and early afternoon until upon the examination of the fourth witness, Special Agent Deery, there occurred the colloquy set forth in the margin resulting in the declaration of a mistrial by the judge.[3] Later Judge Rayfiel in a

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[3] "PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

"*Direct Examination by Mr. Passalacqua*:

"Q. Mr. Deery, how long have you been an agent of the F. B. I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

(*footnote continued on next page*)

[fol. 48] reasoned opinion, denied defendant's motion to dismiss the information on plea of former jeopardy, and [fol. 49] he was convicted and sentenced to imprisonment after a jury trial before Chief Judge Bruchhausen. He now appeals from both these actions of the district court, but relies only on the claim of former jeopardy and assigns no error as to his trial before Judge Bruchhausen.

The colloquy set forth in the margin demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions. This is borne out by the entire transcript, including also that covering the morning

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"Mr. Passalacqua: Your Honor, I think—please allow me—

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has been already answered, February 10th.

"Q. When did you see him for the second time? A. February—

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? A. He met another individual.

"Q. Where did you see him on February 11th—

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—. Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all."

session. Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. But if he was thus over-assiduous, pursuing the command role which he had assumed for himself, it seems clear that he was acting according to his convictions in protecting the rights of the accused. The defense now urges that the judge was endeavoring to punish counsel's disobedience, but such a characterization, even if apt, adds nothing significant to his over-all purpose; and as to this the defense elsewhere states, "It is undeniable that the trial court was concerned with protecting the rights of the appellant." It is to be noted that the defendant made the original objections leading to the order of mistrial and that he made or attempted no protest to the order itself, but accepted the [fol. 50] benefit of the new trial. We have the issue, therefore, whether active and express consent—something beyond acquiescence—is required to prevent this defendant, now convicted after a concededly fair trial, from receiving absolution for his crime by reason of the overzealousness of the trial judge on his behalf. A majority of this court concludes that the federal law does not so command.

The mandate of the Fifth Amendment to the United States Constitution is " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * ." In considering whether the declaration of a mistrial precludes a subsequent prosecution for the same offense the Supreme Court has rejected any rigid formularization of the constitutional requirement in favor of a flexible application of the prohibition. *Wade* v. *Hunter*, 336 U. S. 684, 690. This approach originated in *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580, where Justice Story stated: "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are

to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." This controlling principle was succinctly reiterated in *Brock* v. *North Carolina*, 344 U. S. 424, 427:

> "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. *Wade* v. *Hunter*, 336 U. S. 684; *Thompson* v. *United States*, 155 U. S. 271, 273-274. As was said in *Wade* v. *Hunter*, *supra*, p. 690, 'a [fol. 51] trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.'"

To the same effect are *Lovato* v. *New Mexico*, 242 U. S. 199; *Simmons* v. *United States*, 142 U. S. 148; *United States* v. *Cimino*, 2 Cir., 224 F. 2d 274; *United States* v. *Potash*, 2 Cir., 118 F. 2d 54, certiorari denied *Potdsh* v. *United States*, 313 U. S. 584; *Scott* v. *United States*, D. C. Cir., 202 F. 2d 354, certiorari denied 344 U. S. 879; *United States* v. *Giles*, D. C. W. D. Okl., 19 F. Supp. 1009. It is to be noted that in none of these cases is the element of consent by the accused held necessary to obviate the constitutional bar; in fact, they are authority for the contrary view. Actually in several the mistrial had been declared either on the motion of the prosecution or by the court of its own motion, but over the vigorous opposition of the defense; this was the situation in the *Simmons*, *Scott*, and *Giles* cases, as well as in the *Brock* case, which concerned a state conviction reviewed under the Fourteenth Amendment.[4] In yet others, as in *Lovato*, *Cimino*, and *Potash*, it had been declared on the government's or the court's motion, with no showing of express consent by the

[4] So in *Forman* v. *United States*, 361 U. S. 416, where the Court of Appeals had originally reversed a conviction and directed an acquittal, but later modified this to direct a new trial, on motion of the government and against defense objection, the Supreme Court rejected the plea of double jeopardy.

accused. In all these the ultimate conviction was upheld against the plea of double jeopardy.

The defendant relies on *Himmelfarb* v. *United States*, 9 Cir., 175 F. 2d 924, certiorari denied 338 U. S. 860, as showing the need of consent; but such was not the court's approach there. Accepting the now well settled view that waiver or consent by the defendant barred his later re- [fol. 52] sort to the plea,[5] the court first considered and held ineffective a waiver by counsel without his client's specific assent. Having thus cleared the way, it passed to the "real issue presented," which was "whether or not there was a legal necessity supporting the discharge of the first jury." And this it considered at considerable length with a wealth of learning and citation of authority, concluding: "We think the court did not abuse its discretion." So the denial of the plea was upheld and the conviction was *affirmed*. To similar effect are cases such as *Ex parte Glenn*, C. C. N. D. W. Va., 111 Fed. 257, reversed on other grounds *Moss* v. *Glenn*, 189 U. S. 506, and *United States* v. *Watson*, D. C. S. D. N. Y., 28 Fed. Cas. No. 16,651. Thus while consent may bar resort to the plea, its absence does not relieve the judge of responsibility and discretion to discontinue a particular trial when justice so requires. *Wade* v. *Hunter*, *supra*, 336 U. S. 684, 689.

The law as thus stated comports more with our fundamental concepts of the federal administration of criminal justice than does the rigid and inflexible rule contended for by the accused. It has been a source of pride federal-wise that a United States district judge is more than a mere automaton or referee and bears an affirmative responsibility for the conduct of a criminal trial. This responsibility is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal. If the accused retains essentially a power of veto

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[5] See, e.g., *Blair* v. *White*, 8 Cir., 24 F. 2d 323; *Barrett* v. *Bigger*, D. C. Cir., 17 F. 2d 669, certiorari denied 274 U. S. 752; *United States* v. *Harriman*, D. C. S. D. N. Y., 130 F. Supp. 198, 204, notwithstanding Mr. Justice Holmes' view to the contrary stated in *Kepner* v. *United States*, 195 U. S. 100, 136.

on pain of ban of all prosecution, even though fully justified, it is clear that the judge does not retain control of [fol. 53] his courtroom and cannot act as he thinks necessary either to protect the interests of the litigants or to preserve proper respect for federal law administration. Even though there may be a rare case where in retrospect the judge may seem to have been overzealous in his protection of the rights of an accused, we think the law is better served by the preservation of the responsibility which the federal precedents impose upon him.

On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trials for essentially the same offense.[6] On the other hand,

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[6] See full discussion in *United States* v. *Sabella*, 2 Cir., 272 F. 2d 206, and *Green* v. *United States*, 355 U. S. 184, a 5–4 decision where the two opinions are notable for their historical exegesis of the plea. The question in *Green* was as to jurisdiction, after reversal on appeal, to retry the accused for the greater offense of which he had been originally acquitted. But the majority, in sustaining the plea and pointing out that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict," reiterate, 355 U. S. at page 188: "At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances * * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter*, 336 U. S. 684, 688-689." In *United States* v. *Whitlow*, D. C. D. C., 110 F. Supp. 871—a case criticized in 67 Harv. L. Rev. 346 (1953) for inflexibility—the court upheld the plea when the mistrial had been declared because of the misconduct of the defendant's counsel.

[fol. 54] for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future.

I am authorized to say that Chief Judge Lumbard and Judges Moore and Friendly concur in this opinion.

Conviction affirmed.

WATERMAN, Circuit Judge (dissenting):

It is quite clear that the district judge, on February 4, 1959, ordered a mistrial because of actions which he believed to constitute trial misconduct on the part of the Assistant United States Attorney.[1] Accordingly, it must first be asked if a mistrial for this reason may be ordered by a district judge, acting entirely *sua sponte*, without giving rise subsequently to valid plea of former jeopardy under the Fifth Amendment. If not, a second question arises: did the defendant here expressly or impliedly request or consent to the mistrial order? I believe that both these questions must be answered in the negative, and therefore I dissent.

The former jeopardy clause of the Fifth Amendment reads as follows: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" The clause consistently has been interpreted not only to forbid multiple punishment for the same offense but also to forbid successive exposures to a single punishment. *United States* v. *Ball*, 163 U. S. 662, 666-71 (1896); *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 169 (1873 Term); and see also *United States* v. *Sabella*, 272 F. 2d 206, 208-10 (2 Cir. 1959). Thus, once a jury has been impaneled [fol. 55] and sworn[2] it is said jeopardy attaches, and if a

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[1] The district judge stated: "I declare a mistrial because of the conduct of the district attorney."

[2] In a non-jury case it is stated that jeopardy attaches once the defendant has pleaded and the court has begun to hear evidence. *Clawans* v. *Rives*, 104 F. 2d 240, 242 (D. C. Cir. 1939); *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), cert. denied, 299 U. S. 610.

mistrial is then ordered, subsequent prosecution is barred, *Green v. United States*, 355 U. S. 184, 188 (1957); *Bassing v. Cady*, 208 U. S. 386, 391 (1908); *McCarthy v. Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), *cert. denied*, 299 U. S. 610; *Cornero v. United States*, 48 F. 2d 69 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587 (W. D. Mo. 1890), *app. dismissed*, 489 U. S. 789, unless the defendant has consented to the mistrial order, *Blair v. White*, 24 F. 2d 323 (8 Cir. 1928); *Barrett v. Bigger*, 17 F. 2d 669 (D. C. Cir. 1927), *cert. denied*, 274 U. S. 752; *United States v. Harriman*, 130 F. Supp. 198, 204 (S. D. N. Y. 1955). It is settled that a plea of former jeopardy does not lie when a mistrial is ordered because of the jury's inability to reach an agreement after submission, *Keerl v. Montana*, 213 U. S. 135 (1909); *Dreyer v. Illinois*, 187 U. S. 71, 84-87 (1902); *Logan v. United States*, 144 U. S. 263, 297-98 (1892); *United States v. Perez*, 9 Wheat. (22 U. S.) 579 (1824 Term), or when a juror is discovered to be incompetent or becomes incapacitated, *Thompson v. United States*, 155 U. S. 271 (1894); *Simmons v. United States*, 142 U. S. 148 (1891); *United States v. Potash*, 118 F. 2d 54 (2 Cir. 1941), *cert. denied*, 313 U. S. 584; *United States v. Haskell*, 26 Fed. Cases No. 15, 321 (E. D. Pa. 1823 Term). There are also cases disallowing the plea of former jeopardy when the mistrial order resulted from the courtroom conduct of particular persons. Prior to this case the prosecuting attorney has not been included in this group. See *United States v. Cimino*, 224 F. 2d 274 (2 Cir. 1955) (exclamations of a juror); *Scott v. United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881 (withdrawal of associate counsel ap-
[fol. 56] pointed by the court); *United States v. Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937) (exclamations of a trial judge questioning Government's good faith in prosecuting); but cf. *United States v. Whitlow*, 110 F. Supp. 871 (D. C. D. C. 1953) (misconduct of defendant's counsel held too minor to nullify plea of former jeopardy). For reasons to be set forth subsequently I am of the opinion that a mistrial ordered because the trial judge believed that the prosecuting attorney was guilty of misconduct presents a different problem than that presented in these cases.

All the cases purporting to be exceptions to the rule that a mistrial may not be ordered without the defendant's consent "once jeopardy has attached" rely upon the authority and rationale of *United States* v. *Perez*, *supra*. There, at page 580, Justice Story said:

> "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office."

[fol. 57] Without in any way disagreeing with the result in the *Perez* case or with the results in the cases which have relied upon it, I submit that as a guide for determining when subsequent prosecution is to be barred by the former jeopardy clause of the Fifth Amendment, Justice Story's discussion in *Perez* is analytically inadequate. If the former jeopardy clause is to be taken seriously as a constitutional right of criminal defendants and if one accepts the principle that jeopardy attaches at the commencement of trial, it defies analysis to hold that this constitutional right can *always* be nullified by some discretionary act on the part of the judge at the first trial.[3] The inadequacy of such a "dis-

[3] In *Cornero* v. *United States*, 48 F. 2d 69, 72 (9 Cir. 1931) it was suggested that when the *Perez* opinion referred to the discretion of the trial judge it contemplated the discretion involved in determining how long the jury should be required to deliberate prior to its discharge for having failed to reach a verdict.

cretionary" rationale becomes peculiarly apparent in the present case. The majority opinion is at pains to demonstrate the propriety of the Assistant United States Attorney's conduct. They state that the Assistant United States Attorney did nothing to instigate a mistrial, that he merely performed his assigned duties "under trying conditions." The action of the district judge in ordering the mistrial, expressly characterized as "over-assiduous" and "over-zealous," is thus clearly regarded by my colleagues as having been a mistaken action. How then can it be said that the district judge did *not abuse* his discretion in ordering a mistrial? I cannot follow my colleagues on this issue; the result they reach is to me a *non sequitur*. However, my dissent is based upon other grounds, for I believe the question before us should be resolved without any reliance whatever upon amorphous principles of discretion.

Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the one case where the [fol. 58] trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. *United States* v. *Ball*, 163 U. S. 662, 669-70 (1896). As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a "nolle prosequi" during the trial without the bar of former jeopardy attaching. See *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Cornero* v. *United States*, 48 F. 2d 69, 71 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587, 595 (W. D. Mo. 1890); *app. dism'd*, 189 U. S. 789; *United States* v. *Shoemaker*, 27 Fed. Cases No. 16,279 (D. Ill. 1840); and cf. Frankfurter, *J.*, concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 428-29 (1953). Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed.

So far as I have been able to discover, of the cases permitting retrial subsequent to a mistrial that had been ordered after the initial trial had begun, in only two have the factors that produced the mistrial order been within the

control of the prosecution. These two cases are *Wade* v. *Hunter*, 336 U. S. 684 (1949), *reh'g denied*, 337 U. S. 921, and *Lovato* v. *New Mexico*, 242 U. S. 199 (1916) and neither case contradicts the conclusion expressed in the preceding paragraph. *Wade* v. *Hunter* involved court martial proceedings initiated at the front during the invasion of Germany during the Second World War. There the Court, at pages 691-92, found "extraordinary reasons" justifying adjournment of the first trial. The circumstances of the *Wade* case would appear to objectively preclude any possibility that the adjournment ordered there resulted from a fear that the trier of fact would decide against the prosecu- [fol. 59] tion. Similarly, the abuse was objectively impossible under the facts in *Lovato*. There the identical jury which had been discharged so that the defendant could be arraigned prior to trial was reimpaneled to hear the case after the defendant's arraignment.

The references throughout this opinion to "misconduct" on the part of the Assistant United States Attorney should not be taken as indicating that, on this point, I am in accord with the District Judge and, with him, believe that the conduct of the Assistant United States Attorney was improper. I agree with my colleagues that the Assistant United States Attorney attempted conscientiously to present his case in a manner consistent with the rulings of the district judge. However, the significant fact is the district judge's belief. This erroneous belief deprived appellant of his right to take his case to the jury as the jury was then constituted. It is implicit in the former jeopardy clause that, as in criminal proceedings generally, the injurious consequences of erroneous rulings by the trial judge have to be borne by the prosecution rather than by the defendant.

Furthermore, although we reach contrary conclusions, I agree with my colleagues that the correct disposition of the issue before us does not depend upon whether the district judge was acting to protect the defendant or whether he was acting to punish imagined disobedience. If the former, I maintain that the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice:

his retrial should not be permitted. If the latter, I think it equally clear that the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights.

[fol. 60] I conclude that a district judge, acting *sua sponte*, does not have power to order a mistrial because of trial misconduct by the prosecuting attorney without giving rise to a sustainable plea of former jeopardy should retrial be attempted. Thus it becomes necessary to consider whether this appellant in some manner may be said to have consented to the mistrial order.

Although I find the court's opinion unclear on this point, it may be that my colleagues imply consent from two actions by appellant during the trial. My colleagues mention the fact that appellant made objections which might have led to the mistrial order, and they also mention that he did not protest the order itself.

As to the first ground, objections to testimony cannot be said to constitute consent to a subsequent mistrial order, for objections to testimony obviously assume that the trial is to continue. Moreover, as a matter of policy, I oppose a rule that would inhibit defense counsel from making objections during a trial lest, by objecting, counsel be found to have consented, in advance, to a mistrial order. Finally, I think the part the defendant's objections played in leading to the mistrial order in the present case has been overemphasized in the court's opinion.[1]

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[1] My colleagues refer to the defense's "continuous formal objections." This is misleading. At the morning session only did the defense interpose frequent objections. The first government witness, the shipper's traffic manager, was then testifying. Primarily these objections were directed to the admissibility of certain bills of lading. The district judge consistently overruled the defense, and the frequency of the objections was caused in part from the district judge's admonition to the defense to preserve this point. The district judge did not display notable impatience with the conduct of the Assistant United States Attorney or rule favorably to the defense until the abbreviated testimony of the third and fourth government witnesses, the two FBI agents, who testified in the afternoon. The district judge's displeasure with the trial conduct of the Assistant United States Attorney during their examination, a displeasure that I join my colleagues in being unable

[fol. 61] As to the contention that consent may be implied from appellant's failure to object to the mistrial order, similar contentions were made and rejected in *Himmelfarb* v. *United States*, 175 F. 2d 924, 931-32 (9 Cir. 1949), *cert. denied*, 338 U. S. 860; *Ex parte Glenn*, 111 Fed. 257, 259 (N. D. W. Va. 1901), *rev'd on other grounds*, 189 U. S. 506; *United States* v. *Watson*, 28 Fed. Cases No. 16,651 (SDNY 1868). Under different circumstances than here present one court may have implied consent from a failure to object to a mistrial order. In *Scott* v. *United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881, during the absence of the jury but in the presence of the defendant and his attorney, the trial judge stated he had decided to declare a mistrial. The jury was then called back into the courtroom and the order announced. During this time no objection was made. In the present case, however, the possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from appellant's failure to protest.

I would reverse with directions to dismiss the information.

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to account for, was not instigated by defense counsel, whose role during this portion of the trial was entirely passive. The trial record discloses that neither counsel anticipated the course so suddenly taken and that the withdrawal of the juror must have been as much of a surprise to defense counsel as it was to the Assistant United States Attorney.

[fol. 62]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

DANTE EDWARD GORI, Defendant-Appellant,
FRANKLIN OSBORN CORBETT, Defendant.

JUDGMENT—July 22, 1960

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk. By Niall F. O'Doherty, Chief Deputy Clerk.

[fol. 63] [File endorsement omitted]

[fol. 84]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Petition filed August 5, 1960)

Docket No. 26048

UNITED STATES OF AMERICA, Appellee,

—v.—

DANTE EDWARD GORI, Defendant-Appellant.

Before: Lumbard, Chief Judge, and Clark, Waterman, Moore, and Friendly, Circuit Judges.

On Petition of Appellant for Rehearing

Jerome Lewis, Brooklyn, N. Y., for appellant.

PER CURIAM ON PETITION FOR REHEARING—August 18, 1960

On the merits of this appeal we find nothing to add to the discussions already had. Appellant, however, objects to the procedure *in banc* followed here and claims a right of oral argument. This is a point we should discuss, since counsel generally should be apprised of our procedure so far as we have developed it. There is of course nothing secret as to our processes of advancing a case to the point of adjudication.

[fol. 85] We have recently adopted our Rule 25(b) dealing with petitions for rehearing. This reads as follows:

"(b) *Disposition.* Any petition for rehearing shall be addressed to the court as constituted in the original hearing. It shall be disposed of by the court as so constituted unless a majority of said court or any active judge of this court, either from a suggestion by petitioner or *sua sponte*, shall be of the opinion that the case should be reheard in banc, in which event the Chief Judge shall cause that issue to be determined by the active judges of this court. Rehearing, whether by the court as constituted in the original hearing or in banc, shall be without oral argument and upon the papers then before the court, unless otherwise ordered." (Eff. April 25, 1960.)

But additionally the court reserves the right, as the statute, 28 U. S. C. §46(c), provides, to proceed *in banc* whenever a majority of the active judges think such course in the interest of justice and so vote. This necessarily involves the exercise of discretion in each particular case and we have kept formal rules to a minimum. So when the procedure *in banc* has been voted, we have proceeded to decision on only the original papers, *McWeeney* v. *New York, N. H. & H. R. Co.*, 2 Cir., July 29, 1960; *Sperry Rand Corp.* v. *Bell Telephone Laboratories*, 2 Cir., 272 F. 2d 29; *Mueller* v. *Rayon Consultants*, 2 Cir., 271 F. 2d 591; *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, 375, certiorari denied *California Tanker Co.* v. *Reardon*, 359 U. S. 926; *F. & M. Schaefer Brewing Co.* v. *United States*, 2 Cir., 236 F. 2d 889, reversed *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227, or on the mere filing of additional briefs, *American-Foreign S.S. Corp.* v. *United States*, 2 Cir., 265 F. 2d 136, 144, vacated and remanded *United* [fol. 86] *States* v. *American-Foreign S.S. Corp.*, 80 S. Ct. 1336; *In re Lake Tankers Corp.*, 2 Cir., 235 F. 2d 783, affirmed *Lake Tankers Corp.* v. *Henn*, 354 U. S. 147, or after full oral argument, *Pugach* v. *Dollinger*, 2 Cir., 277 F. 2d 739, certiorari granted 80 S. Ct. 1614; *United States* v. *Coppola*, 2 Cir., May 20, 1960; *U. S. ex rel. Marcial* v. *Fay*, 2 Cir., 247 F. 2d 662, certiorari denied *Fay* v. *U. S. ex rel. Marcial*, 355 U. S. 915; *U. S. ex rel. Roosa* v. *Martin*, 2 Cir., 247 F. 2d 659; *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d

416, certiorari denied *Apuzzo* v. *United States*, 355 U. S. 831; and *United States* v. *Santore*, not yet decided. Thus we have no set rule in this regard, but are guided by what we conclude are the needs of a particular case.

These various cases presented all the questions here adverted to, including the supersession of retired or visiting judges by a court comprised of only the active judges. As appears above, the Supreme Court passed upon many of the cases in their substantive aspects, but without raising any question as to the procedure. Petitioner has no absolute right to oral argument; where, as here appeared, the researches of the court and its staff had proceeded beyond that disclosed in the briefs of counsel, further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned.

Petition denied.

[fol. 87]

IN UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—August 18, 1960

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk, By Niall F. O'Doherty, Chief Deputy Clerk.

[fol. 89] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 88] [File endorsement omitted]

[fol. 90]

SUPREME COURT OF THE UNITED STATES

No. ..... October Term, 1960

DANTE EDWARD GORI, Petitioner,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 15, 1960

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17th, 1960.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 15th day of September, 1960.

[fol. 91]

SUPREME COURT OF THE UNITED STATES

No. 486, October Term, 1960

[Title omitted]

ORDER ALLOWING CERTIORARI—December 12, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to the question of double jeopardy presented by the petition and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MILTON C. WEISMAN
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Of Counsel

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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IN THE

Supreme Court of the United States

October Term, 1960

No.

DANTE EDWARD GORI,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Dante Edward Gori, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 22, 1960, affirming petitioner's conviction on his retrial in the United States District Court for the Eastern District of New York after an earlier declaration of mistrial, for having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U.S.C. 659.

Opinions Below

The opinion of the District Court denying petitioner's motion to dismiss the information on the plea, *inter alia*, of former jeopardy (R. 24a-26a) has not been reported;

it appears as Appendix A to this petition, *infra*, pp. 1a-4a. The District Court wrote no other opinion. The opinions of the Court of Appeals affirming the conviction on retrial (R. 45a-61a) have not yet been reported; they appear as Appendix B to this petition, *infra*, pp. 5a-23a. The *per curiam* opinion of the Court of Appeals denying petitioner's petition for a rehearing (R. 84a-86a) has likewise not yet been reported; it appears as Appendix C to this petition, *infra*, pp. 24a-26a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 22, 1960 (R. 62a). Its order denying the petition for rehearing duly filed was entered on August 18, 1960 (R. 87a). On September 15, 1960, Mr. Justice Harlan extended the time within which this petition might be filed to October 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a defendant in a criminal case in the Federal courts may constitutionally be subjected to the jeopardy of a second trial where his earlier trial for the same offense terminated in a mistrial declared without his request or consent and:

   (a) where the record discloses no "manifest necessity" for the declaration of mistrial;

   (b) where there is in fact no "manifest necessity" for the declaration of mistrial; and

(c) where the trial judge believes that the prosecutor is about to engage in misconduct and abruptly declares a mistrial in the presence of the jury presumably in order to protect the rights of the defendant although the defendant is not consulted.

2. Whether the authority of the district judge to declare a mistrial, without the bar of former jeopardy attaching, is a discretionary authority reviewable by the appellate courts or an absolute and unreviewable authority.

3. If the authority is a discretionary authority, whether the declaration of a mistrial by the district judge in this case was in his sound discretion.

4. Whether the misconduct of a prosecutor can, in any event, constitute such "manifest necessity" for the declaration of a mistrial by a district judge as to preclude the bar of former jeopardy attaching, where the defendant neither requests nor consents to the mistrial.

5. If so, whether such a declaration of a mistrial because of the misconduct of the prosecutor and without the request or consent of the defendant deprives him of the right to effective assistance of counsel guaranteed by the Sixth Amendment.

6. Whether the sudden and abrupt declaration of mistrial by the district judge in this case without consulting the defendant or permitting his counsel to speak to it violated the guarantee of effective assistance of counsel provided by the Sixth Amendment and barred the subsequent retrial of the defendant.

7. Whether the failure of a defendant formally to object to the district judge's abrupt declaration of a mistrial, in the presence of the jury and without first consulting or inviting the expression of opinion by the defendant, constituted a waiver by the defendant of his right to be free from subjection to double jeopardy for the same offense.

8. Whether, in the following circumstances, a Court of Appeals properly employed the *in banc* procedure for disposition of appeals provided in 28 U.S.C. 46(c):

(a) oral argument of the appeal was heard initially by a court consisting of a panel of three judges;

(b) in conference, two of the judges voted for reversal of the conviction and one for affirmance;

(c) a majority of the active judges of the Circuit thereupon voted to dispose of the appeal *in banc* and, without advice to the defendant-appellant or further oral argument or briefs, disposed of the appeal *in banc*;

(d) in the course of such *in banc* disposition, one of the originally constituted court, having served by statutory designation, was "disenfranchised" and his earlier vote for reversal of the conviction not considered;

(e) the conviction was affirmed by four of the members of the *in banc* court, one judge dissenting; and

(f) the defendant's subsequent request for reargument to and the filing of new briefs with the entire *in banc* court was denied.

9. Whether, in those circumstances, the *in banc* procedure employed to dispose of this case contravenes the due process requirements of the Constitution.

Constitutional Provisions and Statute Involved

The constitutional provisions involved are the Fifth and Sixth Amendments.

The following provisions of 28 U.S.C. 46(c) (June 25, 1958, c. 646, 62 Stat. 871) are also involved:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

Statement of the Case

Petitioner, charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U.S.C. 659, was placed on trial before a jury in the United States District Court for the Eastern District of New York on February 4, 1959.[1] The Government proceeded

[1] The information was in one count; it charged petitioner and one Franklin Osborne Corbett with having received and having had in their possession twenty-two cases of women's and children's gloves known to be stolen. Corbett pleaded guilty, and petitioner not guilty. The opening trial statement of petitioner's counsel disclosed that petitioner would claim that he had acted without knowledge that the goods in question were stolen and only as Corbett's hired employee (R. 5a, 8a).

with its case during the morning and early afternoon of that day. In the afternoon, during the examination of the Government's fourth witness, FBI Special Agent Deery, and without affording either party an opportunity to address himself to the propriety of such action, the district judge *sua sponte* declared a mistrial "because of the conduct of the district attorney" (R. 20a-22a). However, as the court below notes, the record does not "make entirely clear the reasons which led the judge to act" (Appendix B, *infra*, p. 9a). The colloquy immediately preceding the declaration of mistrial appears in the margin.[2]

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[2] PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Passalacqua:

"Q. Mr. Deery, how long have you been an agent of the F.B.I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

"Mr. Passalacqua: Your Honor, I think—please allow me—

After the mistrial, petitioner moved to dismiss the information on the plea of former jeopardy (R. 10a-11a). That motion, however, was denied, and petitioner subjected to retrial on the same information before another judge and jury.[3] Petitioner reasserted his plea of former jeopardy.

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has already been answered, February 10th.

"Q. When did you see him for the second time? A. February—

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? A. He met another individual.

"Q. Where did you see him on February 11th—

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more district attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all" (R. 20a-22a).

[3] Although the opinion denying the motion for dismissal was filed on March 26, 1959, the order was entered on that opinion only on July 22, 1959 (R. 38a), several months after the entry of the judgment of conviction on the retrial (R. 36a-37a).

The case was nevertheless submitted to the jury, and a verdict of guilty returned. On April 30, 1959, the judgment of conviction was entered and petitioner sentenced to imprisonment for a term of three and one-half years (R. 36a-37a).

Appeals were thereupon taken from the judgment of conviction and the order denying the motion to dismiss the information (R. 39a, 40a). The appeals were heard together before a panel of the Court of Appeals consisting of Judges Clark, Waterman and Lewis (the latter, a judge of the Tenth Circuit, sitting pursuant to statutory designation). In conference, Judges Waterman and Lewis voted to reverse and Judge Clark to affirm. Draft opinions reflecting that disagreement were then circulated among the active judges of the court. Although Judge Clark disagreed, noting that the procedure appeared "not to be a settled practice in other circuits", a majority of the active judges voted for an *in banc* disposition of the appeals, "superseding the judgment" of Judge Lewis (Appendix B, *infra*, p. 6a fn. 1). On July 22, 1960, four active judges voting to affirm, Judge Waterman dissenting and Judge Lewis no longer participating, the Court handed down its judgment affirming petitioner's conviction (R. 62a).

The majority of the court was of the opinion that, although "the prosecutor did nothing to instigate the declaration of a mistrial and . . . was only performing his assigned duty under trying conditions", although the record does not "make entirely clear the reasons which led the judge to act", and although "the judge should have awaited a definite question which would have permitted

a clear-cut ruling . . . [and] was thus over-assiduous, . . . it seems clear that he was acting according to his convictions in protecting the rights of the accused" (Appendix B, *infra*, pp. 9a-10a). It concluded therefore that, notwithstanding that petitioner neither requested a mistrial nor actively and expressly consented thereto, petitioner was not so placed in jeopardy by the first trial as to preclude retrial and conviction for the same offense. Judge Waterman dissented, pointing out that, even on the rationale of the majority's opinion, the district judge's declaration of mistrial constituted an abuse of discretion and insisting further that "misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed" (*Id.* 18a-19a).

A petition for rehearing was filed on the grounds, *inter alia*, that the *in banc* procedure as here applied was improper and that the court was mistaken on the issue of double jeopardy. That petition was denied by *per curiam* opinion on August 18, 1960 (Appendix C, *infra*, pp. 24a-26a).

Reasons for Granting the Writ

This case presents questions, never before submitted to this Court, whose resolution is vital to the administration of justice in the Federal courts. Of primary significance are the questions as to the scope of the constitutional inhibition against double jeopardy in cases of retrial after earlier declarations of mistrial. Those important issues led the Court of Appeals to consider this case *in banc*, and their difficulty is reflected in the sharp disagreement among

the judges below.[4] Also significant are the questions as to the propriety of the *in banc* procedure below; the urgency of such questions is accentuated by the fact that a defendant's constitutional rights are involved.

1. There is first the important question whether a defendant in the Federal courts may constitutionally be subjected to the jeopardy of a second trial where he was once put to trial before a jury for the same offense and, without "manifest necessity" or his request or consent, a mistrial was abruptly declared.

The basic rules are plain: "This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade* v. *Hunter*, 336 U. S. 684; *Kepner* v. *United States*, 195 U. S. 100, 128". *Green* v. *United States*, 355 U. S. 184, 188. "At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict'. *Wade* v. *Hunter*, 336 U. S. 684, 688-689." *Green* v. *United States, supra*, at 188. In such a situation, "when particular circumstances manifest a necessity for so doing, and when failure to dis-

[4] The opinion below notes that the majority of the court voted for an *in banc* disposition of the case because they believed that it "presented a general problem important to the administration of justice in this circuit . . ." (Appendix B, *infra*, p. 15a). In our view, the questions it involves are significant for *all* Federal courts. The Second Circuit court handles a large number of the criminal appeals in the Federal system. See Administrative Office of the United States Courts, Annual Report of the Director, Sept. 1960, Table B1.

continue would defeat the ends of justice" (*Wade* v. *Hunter, supra,* at 690), a trial may be discontinued and the defendant retried without running counter to the Fifth Amendment's provision as to double jeopardy. See, e.g., *Simmons* v. *United States,* 142 U. S. 148; *Thompson* v. *United States,* 155 U. S. 271; *Wade* v. *Hunter, supra.*

The decision below, however, would enlarge the trial judge's discretion in such situations far beyond the limitations imposed by this Court, indeed to such an extent as virtually to emasculate the constitutional provision. For the retrial in this case has been countenanced despite the fact that the record discloses no necessity whatever for the mistrial.

The majority below confesses that it is unable to justify the district judge's action. The colloquy attending the declaration of mistrial, it says, "demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions" (Appendix B, *infra,* p. 9a). There is nothing in the transcript which suggests the contrary. "Nor does it make entirely clear the reasons which led the judge to act . . ." (*Ibid.*). Moreover, even if the intention was "to prevent the prosecutor from bringing out evidence of other crimes by the accused",[5] "the judge should have awaited a definite question which would have permitted a clear-cut ruling" (*Id.* 9a-10a).

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[5] As hereinafter noted (*infra,* pp. 16 *seq.*), even if the prosecutor were guilty of misconduct, it is questionable whether a mistrial declared by reason of such misconduct and without the consent of the defendant would permit his subjection to the jeopardy of a second trial. This is another important question presented by Judge Waterman's dissent.

In short, there is no rational basis in the record for the mistrial. As Judge Waterman, dissenting, remarks: "The action of the district judge in ordering the mistrial, expressly characterized as 'over-assiduous' and 'over-zealous', is thus clearly regarded by my colleagues as having been a mistaken action" (*Id.* 19a).

In such circumstances, how can one rationally derive from this record that "manifest necessity" for discontinuance of trial which alone (so this Court has held) permits a retrial of a defendant without violating the provision as to double jeopardy?

To say, as does the majority below, that the judge must not be disturbed in the "control of his courtroom" and in his responsibility "to protect the interests of the litigants . . . [and] to preserve proper respect for federal law administration" is, in light of the record here, to indulge in irrelevant abstraction. Many years ago, in *United States* v. *Perez*, 9 Wheat. 579, this Court recognized the authority of Federal judges "to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated" (*Id.* 580). But the Court simultaneously announced that, in exercising that authority, the judges must "exercise a sound discretion on the subject" and it admonished that "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . ." (*Ibid.*).

A "sound discretion" is, of course, a judicial discretion, "proceeding upon ascertained facts according to rules of

law, and subject to review for apparent errors." *Barry* v. *Edmunds*, 116 U. S. 550, 566; *National Ben. Life Insurance Co.* v. *Shaw-Walker Co.*, 111 F. 2d 497, 507 (D. C. Cir), cert. den. 311 U. S. 673; *Davis* v. *Peerless Insurance Co.*, 255 F. 2d 534, 536 (D. C. Cir.). Meaningful review contemplates some articulation by the district judge of the rationale underlying his declaration of mistrial. Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 674-675; *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80; *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 196.

Here, however, we cannot know why the district judge thought a mistrial appropriate. The record is silent, and the Court of Appeals supplies no rational justification. The trial transcript suggests that the judge may have believed the prosecutor was *about to* ask a question prejudicial to the defendant. That anticipated event, however, never did occur, and the district judge's action, so far as the record discloses, was quite unnecessary.

In such circumstances, it will not do to sustain the district judge's action because "it seems clear [to the majority of the court below] that he was acting according to *his* convictions in protecting the rights of the accused" (Appendix B, *infra*, p. 10a, emphasis supplied). The subjective predilections or convictions, the "personal and private notions" of judges are irrelevant to the adjudication of personal constitutional rights. Cf. *Rochin* v. *California*, 342 U. S. 165, 170. Only "manifest necessity" justifies terminating one trial and putting a defendant to a second for the same offense.

Nevertheless, finding no rational basis for the district judge's declaration of mistrial, the court below resorts to

divination and faith. It abdicates its duty of effective review and its responsibility to insure defendants against double jeopardy. It vests the district judge in effect with absolute authority to declare a mistrial and to subject a defendant to retrial without regard to necessity, let alone "manifest necessity", for doing so. "Sound discretion" thus gives way to absolute power.

Brock v. *North Carolina*, 344 U. S. 424, on which the court below relies, hardly sanctions the ruling in this case. The Court there did speak of a "discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served" (344 U. S. at 427). It did not say, however, that the district judge's measure of what will serve justice is final and indisputable. In *Brock*, the appellate courts could readily examine into the trial judge's exercise of discretion, for the record plainly revealed the basis for his action—a temporary unavailability, by reason of pleas against self-incrimination, of testimony vital to the prosecution. In our case, contrariwise, the appellate courts cannot effectively review the judge's declaration of a mistrial, for we are not informed of the basis for his action. Furthermore, *Brock* involved state, not Federal, action and thus did not raise the question of double jeopardy under the Fifth Amendment, "as the Fifth Amendment applies only to Federal jurisdictions" (*Id.* 426). See *Bartkus* v. *Illinois*, 359 U. S. 121.

The opinion of the Ninth Circuit in *Cornero* v. *United States*, 48 F. 2d 69, appears more consonant with constitutional principle and the prior pertinent opinions of this Court than does the opinion of the majority below. In *Cornero*, the court, in part, says (48 F. 2d at 71):

> "We are here dealing . . . with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice."

A trial judge who remains sensitive to the constitutional provision on double jeopardy and consequently hesitant to discharge a jury except in a case of urgent necessity does not on that account become a "mere automaton or referee" or compromise his "responsibility for the conduct of a criminal trial" (Appendix B, *infra*, p. 13a).[6] In any event, as Judge Waterman says, "the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights" (Appendix B, *infra* p. 21a).

The question of which we have here been speaking—whether a defendant may be subjected to the jeopardy of a second trial where a previous trial for the same offense has ended in a mistrial declared apparently without manifest necessity and without the defendant's request or consent—is an important question of Federal law which has not been, but should be, settled by this Court. In sustaining petitioner's conviction on such a retrial, the court below so far sanctioned a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Moreover, the fundamental divergence of opinion which is

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[6] It is notable that the district judge whose declaration of mistrial is sustained below as required by "the ends of justice" was himself far from certain that his action was so urgent as to warrant a second trial. Discharging the jury, the judge said, in part (R. 22a):

> ". . . I declare a mistrial and *I don't care whether the action is dismissed or not* . . ." (emphasis supplied).

articulated in the ruling below and that of the Ninth Circuit in *Cornero* v. *United States*, *supra*, reflects a conflict between the two circuits which requires resolution by this Court.

2. This case presents a second important question of Federal law: whether a prosecutor's misconduct can *in any event* justify a mistrial and a second trial for a defendant in the Federal courts. Judge Waterman's conclusion that it cannot furnishes one of the bases for his dissent. The ruling below that a trial may be discontinued and a defendant put to the jeopardy of a second trial, without his request for or consent to a mistrial and solely by reason of the prosecutor's misconduct (or the trial judge's mistaken notion that such misconduct was about to occur), raises a serious and fundamental question affecting a defendant's rights, which this Court has never resolved.

The court below absolved the prosecutor in this case from any charge of misconduct:

> ". . . the prosecutor did nothing to instigate the declaration of a mistrial and . . . he was only performing his assigned duty under trying conditions" (Appendix B, *infra*, p. 9a).

Yet it sustained the judge's declaration of a mistrial and sanctioned petitioner's retrial, apparently on the rationale that the judge's action was to be condoned because he *believed* he was protecting petitioner's rights from misconduct by the prosecutor.

Judge Waterman succinctly states the question this ruling presents (Appendix B, *infra*, p. 19a):

> "Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the one

> case where the trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. . . . As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a 'nolle prosequi' during the trial without the bar of former jeopardy attaching. . . . Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed."

This Court has permitted the retrial of defendants after earlier mistrials, finding "manifest necessity" for the earlier trials' discontinuance, in cases where a jury has been unable to agree upon a verdict (*United States* v. *Perez*, 6 U. S. 194; *Keerl* v. *Montana*, 213 U. S. 135; *Logan* v. *United States*, 144 U. S. 263, 298; *Dreyer* v. *Illinois*, 187 U. S. 71); where an urgent military situation has forced a suspension of a court martial hearing (*Wade* v. *Hunter*, 336 U. S. 684); where a jury admittedly has read an inflammatory and prejudicial letter concerning the case (*Simmons* v. *United States*, 142 U. S. 148); where, during a trial, a juror has been found disqualified by reason of his service on the grand jury which had returned the indictment (*Thompson* v. *United States*, 155 U. S. 271); where it has been discovered, after the jury has been impaneled, that the defendant had not been arraigned and, after his arraignment, the identical jury has immediately been reimpaneled (*Lovato* v. *New Mexico*, 242 U. S. 199); and where the trial judge has rescinded an order of consolidation and the same jury has been reimpaneled to try one of the severed

indictments (*Ex Parte Bigelow*, 113 U. S. 328). It has, however, never held the misconduct of a prosecutor sufficient justification for mistrial and subsequent retrial, absent request or consent by the defendant for the mistrial. Nor, so far as we are able to ascertain, has any of the lower Federal courts sanctioned such a departure from the guarantee against double jeopardy. Cf. *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C.).

The vice of permitting a district judge to terminate a trial because of a prosecutor's misconduct and thereafter to subject the defendant to a second trial for the same offense is twofold: (1) it permits, if indeed it does not encourage, an ineffective prosecutor or one whose case appears weak to provoke the declaration of mistrial and thus to secure the advantage of a fresh start; and (2) it deprives an accused of that effective assistance of counsel which the Sixth Amendment guarantees him.

The prosecutor is victim to the foibles of all men. He is unfortunately too often intent on securing conviction rather than on assuring a fair trial. See, *e.g.*, *Napue* v. *Illinois*, 360 U. S. 264, 269-270, and cases cited. If his case proves weak or the jury unsympathetic and he believes he can secure a mistrial and retrial whether or not defendant's counsel consents, he will be prone to indulge in misbehavior to provoke a declaration of mistrial. Undoubtedly, it is that consideration which, as Judge Waterman points out (Appendix B, *infra*, p. 20a), has led courts to sanction retrials generally only where the factors inspiring them have been within the control of others than the prosecution. "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discon-

tinuing the trial when it appears that the jury might not convict." *Green* v. *United States*, 355 U. S. 184, 188. As Mr. Justice Frankfurter said, concurring, in *Brock* v. *North Carolina*, *supra*, 344 U. S. at 424:

> "A State falls short of its obligation when it . . . prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

The majority below insists, however, that to prevent a district judge from declaring a mistrial for a prosecutor's misconduct except at the risk of permitting the accused to go free would be to deprive the judge of control of his courtroom and to prevent him from preserving proper respect for Federal law administration. This philistine readiness to sacrifice personal constitutional rights to amorphous public interest is unfortunate. If the public interest demands that a mistrial be declared, it may be necessary to do so, but, we insist, not at the expense of the defendant; the Government must choose which interest it will satisfy. Cf. *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir.).

In any event, the problem can readily be solved by inviting defendant's counsel to move for a mistrial. In such case, of course, defendant, if he consents, will be held to have waived the guarantee against double jeopardy and will not be heard to object to a new trial. In the instant case, however, the district judge completely ignored defendant; he did not deign even to consult with defendant's counsel. Angered by the anticipation of misconduct by the prosecutor, the judge declared the mistrial abruptly and in the presence of the jury and discharged the jury without

affording defendant's counsel an opportunity to speak. By so doing, the trial judge plainly violated the strictures of the Sixth Amendment.

The assistance of counsel guaranteed by the Sixth Amendment means the *effective* assistance of counsel. See, e.g., *Powell* v. *Alabama*, 287 U. S. 45, 68-71; *Neufield* v. *United States*, 118 F. 2d 375 (D.C. Cir.). The dramatic suddenness of the mistrial declaration here, however, precluded any expression of opinion on defendant's behalf; indeed, defendant and his counsel were not even accorded an opportunity to confer. It may be a trial judge's prerogative, as the majority below says (Appendix B, *infra*, p. 13a), to "retain control of his courtroom"; it is not his prerogative, as the majority seemingly asserts, to control the conduct of the defendant's case. As Judge Waterman stated (*Id.* 21a), "the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice; his retrial should not be permitted."

3. The decision below is in part posited upon a finding that petitioner waived his constitutional right not to be subjected to double jeopardy. In this respect, the ruling raises a further important question of Federal law; plainly conflicts with the decision of the Ninth Circuit Court in *Himmelfarb* v. *United States*, 175 F. 2d 924, cert. den. 338 U. S. 860; and so departs from the traditionally strict construction accorded waivers of constitutional rights as to call for correction by this Court.

Judge Waterman's dissent here again is persuasive argument for the urgency of review by this Court. Noting that

his colleagues on the Court of Appeals apparently derived a waiver from the facts that, during the course of the earlier trial, petitioner's counsel made objections which might have led to the mistrial order and that petitioner's counsel did not protest the order itself, Judge Waterman replies (Appendix B, *infra*, p. 22a):

> "As to the first ground, objections to testimony cannot be said to constitute consent to a subsequent mistrial order, for objections to testimony obviously assume that the trial is to continue. Moreover, as a matter of policy, I oppose a rule that would inhibit defense counsel from making objections during a trial lest, by objecting, counsel be found to have consented, in advance, to a mistrial order. Finally, I think the part the defendant's objections played in leading to the mistrial order in the present case has been over-emphasized in the court's opinion.
>
> "As to the contention that consent may be implied from appellant's failure to object to the mistrial order, similar contentions were made and rejected in *Himmelfarb* v. *United States*, 175 F. 2d 924, 931-32 (9 Cir. 1949), *cert. denied*, 338 U. S. 860; *Ex parte Glenn*, 111 Fed. 257, 259 (N.D. W. Va. 1901), *rev'd on other grounds*, 189 U. S. 506; United States v. Watson, 28 Fed. Cases No. 16,651 (SDNY 1868). Under different circumstances than here present one court may have implied consent from a failure to object to a mistrial order. In *Scott* v. *United States*, 202 F. 2d 354 (D.C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881, during the absence of the jury but in the presence of the defendant and his attorney, the trial judge stated he had decided to declare a mistrial. The jury was then called back into the courtroom and the order announced. During this time no objection was made. In the present case, however, the

> possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from appellant's failure to protest."

In view of the suddenness of the district judge's action, the fact that the mistrial declaration occurred in the presence of the jury, and the consequent futility of speaking to it, it is startling to find the court inferring consent from petitioner's mere passive "acquiescence" in the trial judge's abrupt ruling. Certainly the decision is in striking conflict with the ruling of the Ninth Circuit in *Himmelfarb* v. *United States, supra,* where the court said, in part (175 F. 2d at 931):

> "The mere silence of an accused or his failure to object or to protest a discharge of the jury cannot amount to a waiver of this immunity. 'It would be a harsh rule to hold that defendant consented to a withdrawal of the case from the jury simply because he interposed no objection.' *State* v. *Richardson,* 47 S. C. 166, 25 S.E. 220, 222, 35 L.R.A. 238."

The readiness of the Court of Appeals here to find a waiver of a personal constitutional right is a radical departure from the rule repeatedly enunciated by this Court which raises a strong presumption against waiver of fundamental rights by an accused and requires that such rights be jealously and vigilantly guarded. See *Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Glasser* v. *United States,* 315 U. S. 60, 70; *Von Moltke* v. *Gillies,* 332 U. S. 708, 723.

4. Finally, this case once again brings to this Court questions as to the *in banc* procedures employed by the Second Circuit Court of Appeals. Cf. *United States* v. *American-Foreign Steamship Corp.*, — U. S. —, 80 S. Ct. 1336. This Court's responsibility, in the exercise of its "general power to supervise the administration of justice in the Federal Courts", to define the requirements of such procedures and to insure their observance warrants the grant of a writ in this case. The problem is a procedural one, but the due process requirements of the Constitution give it special cogency in a criminal prosecution.

The majority's opinion below clearly sets forth the pertinent facts. Petitioner's appeal from the judgment of conviction came on for hearing before a panel of the Court of Appeals consisting of Judges Clark and Waterman of that Circuit and Judge Lewis of the Tenth Circuit, sitting pursuant to statutory designation. In conference, Judges Waterman and Lewis voted to reverse, Judge Clark to affirm the conviction. Draft opinions reflecting that disagreement were circulated among the active judges of the court, and a majority of them voted to dispose of the appeal *in banc*. Thereupon Judge Lewis was "disenfranchised," and four of the five active judges voted to affirm the conviction, Judge Waterman persisting in his vote for reversal (Appendix B, *infra*, pp. 6a-7a).

Petitioner was unaware of these intracameral transactions. It was only on July 22, 1960, when the court handed down its opinion, that he learned that an *in banc* court had considered his case and not the panel before whom the appeal had been argued, and that Judge Lewis, one of the panel members, had been excluded.

Dismayed to find his fate determined by a court to whom he had had no opportunity to address argument, petitioner timely filed a petition urging, *inter alia*, that a rehearing be granted, that on such rehearing Judge Lewis participate, and that oral argument be permitted and new briefs received. The court, by *per curiam* opinion, denied that petition for rehearing in all respects (Appendix C, *infra*, pp. 24a-26a).

The Court admitted that, although it had recently adopted its Rule 25(b), dealing with petitions for rehearing *in banc*, it had no rule as to procedure on initial *in banc* hearings. In such a situation, the judges exercised their discretion "in each particular case and . . . kept formal rules to a minimum" (*Id.* 25a). They had "no set rule in this regard, but are guided by what we conclude are the needs of a particular case" (*Id.* 26a). Replying to petitioner's request to be heard by the *in banc* court, before which he had had no opportunity to argue, the court said that petitioner had "no absolute right to oral argument" and that "further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned." (*Ibid.*)

The manner in which the court thus disposed of petitioner's right to be heard by those who judged him raises serious questions of judicial administration and of due process. We are mindful of the freedom accorded the Federal Courts of Appeals to devise their own administrative machinery in using the *in banc* procedures contemplated by 28 U.S.C. 46(c). *United States* v. *American-Foreign Steamship Corp., supra*, 80 S. Ct. at 1338-1339. But, although this Court has not required the adoption of any particular procedure governing the exercise of that statutory power, it

has directed that "whatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it. . . ." *Western Pacific Railroad Case*, 345 U. S. 247, 267. The Second Circuit appears to have ignored that direction, for it has proceeded, so far as initial *in banc* disposition of appeals is concerned, to treat each case on an *ad hoc* basis. We respectfully suggest that this Court's responsibility to supervise the administration of justice in the Federal judicial system therefore requires examination of this case.

Beyond this, and more fundamentally, it is most doubtful whether the *in banc* procedure here employed can be reconciled with due process. It is noteworthy that in the Third Circuit, whose Court of Appeals was the pioneer in developing the procedure, *in banc* consideration of an appeal occurs only after argument before the entire bench. Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 93. Certainly, an appellant is accorded something less than a due process hearing when he is precluded from presenting his case to all of the judges who will determine it. The unfairness and inequity of such a procedure are compounded by the fact that one of the judges who did hear argument and was persuaded to vote for reversal of the conviction here was ultimately "discharged" from further consideration by the intervention of the *in banc* court. It is significant that Judge Clark, the only member of the original panel who voted for affirmance of the conviction, had serious doubts as to the propriety of the *in banc* procedure and consequently did not vote for it (Appendix B, *infra*, p. 6a, fn. 1).

CONCLUSION

For the foregoing reasons a writ of certiorari should be granted in this case. The decision below radically impairs the constitutional guaranty against double jeopardy. The questions—both with respect to the application of the Fifth Amendment's provision as to double jeopardy and the *in banc* procedure used by the court below in judging this case—are of great moment, have not previously been presented to this Court, and should be settled by it.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner

MILTON C. WEISMAN
HARRY I. RAND
Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Appellee,

—against—

DANTE EDWARD GORI,

Appellant.

Appearances:

NATHAN GOTTESMAN, ESQ.,
Attorney for the Defendant Gori.
For the Motion

CORNELIUS W. WICKERSHAM, JR., ESQ.,
United States Attorney,

BY PETER A. PASSALACQUA, ESQ.,
Assistant U. S. Attorney,
In Opposition.

RAYFIEL, *J.*

This is a motion by the defendant, Dante Edward Gori, for an order dismissing the information herein on the following grounds:

(1) that the information does not state facts sufficient to constitute an offense against the United States,

(2) that the defendant has been placed in double jeopardy in that he was previously tried for the offense charged in said information and a mistrial was declared by the Court due to no fault on the part of the defendant.

The first ground urged is without merit. The information follows generally the language of the statute involved, (440) §659 of Title 18, U. S. Code, and complies in all respects with Rule 7(c) of the Federal Rules of Criminal Procedure.

As to the second ground urged by the defendant, the facts are as follows:—the trial of the case was commenced on February 4, 1959, and on that day, and during the presentation of the Government's case, the trial judge, apparently believing that certain questions asked of Government witnesses on direct examination were or might be prejudicial to the defendant, sua sponte exercised his prerogative and declared a mistrial. Though not sought by the defendant, the mistrial was obviously declared in his interest, and was not based on the kind of jeopardy which would bar a second trial herein. The Supreme Court, in the case of Wade vs. Hunter 336 U. S. 684, had occasion to discuss very fully the rule to be applied on this question, and Mr. Justice Black, stated at page 688 that "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

(441) When justice requires that a particular trial be discontinued is a question that should be decided by persons

conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in United States v. Perez, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:

'. . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in (442) favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .'

The rule announced in the Perez case has been the basis for all later decisions of this Court on double jeopardy. It attempts to lay down no rigid formula. *Under the rule a*

trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." (Emphasis added)

The motion is in all respects denied. Submit order.

Dated: March 26, 1959

LEO F. RAYFIEL
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Argued March 11, 1960 Decided July 22, 1960.)

Docket No. 26048

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANTE EDWARD GORI,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*, and

CLARK, WATERMAN, MOORE, and FRIENDLY, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel and Walter Bruchhausen, *Judges.*

Dante Edward Gori appeals from the denial by Judge Rayfiel of his motion to dismiss, on his plea of former jeopardy, an information charging him with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659, and from his conviction of the offense charged after trial before Judge Bruchhausen and a jury. Affirmed.

Appendix B

JEROME LEWIS, Brooklyn, N. Y., *for defendant-appellant.*

CORNELIUS W. WICKERSHAM, JR., U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Margaret E. Millus, Asst. U. S. Atty., Brooklyn, N. Y., on the brief), *for appellee.*

CLARK, *Circuit Judge*:

This appeal, based upon the defendant-appellant's plea of former jeopardy to avoid a criminal conviction, came for hearing before a panel of this court consisting of Judge Waterman and the writer from this Circuit and Judge Lewis of the Tenth Circuit, sitting with us pursuant to statutory designation. In conference the court was in disagreement, Judges Waterman and Lewis voting to reverse and the writer voting to affirm. Draft opinions reflecting this disagreement, together with the briefs, record, transcript, and appendix, were then circulated among the active judges, a majority of whom, believing that the case presented a general problem important to the administration of justice in this circuit, thereupon voted for disposition of the appeal *in banc*, 28 U. S. C. §46(c).[1] Four active

[1] Although disagreeing with the conclusion of the panel majority, the writer did not vote for the *in banc* procedure. In his experience such procedure does not reconcile differences, but in fact accentuates them. Hence it should be reserved for clarifying issues otherwise presented ambiguously or in a one-sided fashion. Here the important issue seemed fully presented, and there was the added difficulty of superseding the judgment of a distinguished visitor who had graciously complied with our request for help. Though we have acted similarly in other cases, it appears not to be a settled practice in other circuits. See, e.g., *National Latex Products Co.* v. *Sun Rubber Co.*, 6 Cir., 276 F. 2d 167.

judges having then voted to affirm, the writer was assigned to prepare an opinion reflecting this prevailing view.

The defendant was charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659. The trial got under way before Judge Abruzzo on February 4, 1959, after the declaration of a mistrial on the previous day.[2] From the opening by counsel it appeared that the defendant would not contest his receipt and possession of stolen goods on February 11, 1958, with the codefendant Corbett—who pleaded guilty—but would claim that he acted without knowledge of their character and only as Corbett's hired employee. The Assistant United States Attorney attempted to prove this fairly simple case first by the testimony of the shipper's traffic manager, second by the truckman from whose truck the goods were stolen, and third by two FBI Special Agents investigating the theft. He ran into repeated difficulty, however, in part because of continuous formal objections by the defense, but even more by interference on the part of the trial judge, who repeatedly ordered the reframing of questions and otherwise took the conduct of the case away from him. The trial continued its rocky course throughout the morning and early afternoon until upon the examination of the fourth witness, Special Agent Deery, there occurred the colloquy set forth in the margin resulting

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[2] No point was made on this appeal as to this mistrial, which appears to have been granted upon motion of defendant after associate defense counsel was observed talking with one of the jurors.

in the declaration of a mistrial by the judge.[3] Later Judge Rayfiel in a reasoned opinion denied defendant's motion to dismiss the information on plea of former jeopardy, and he was convicted and sentenced to imprisonment after a jury trial before Chief Judge Bruchhausen. He now appeals from both these actions of the district court, but

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[3] "PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

"*Direct Examination by Mr. Passalacqua*:

"Q. Mr. Deery, how long have you been an agent of the F. B. I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

"Mr. Passalacqua: Your Honor, I think—please allow me—

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

relies only on the claim of former jeopardy and assigns no error as to his trial before Judge Bruchhausen.

The colloquy set forth in the margin demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions. This is borne out by the entire transcript, including also that covering the morning session. Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that

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"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has been already answered, February 10th.

"Q. When did you see him for the second time? A. February—

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? A. He met another individual.

"Q. Where did you see him on February 11th—

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—. Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all."

he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. But if he was thus over-assiduous, pursuing the command role which he had assumed for himself, it seems clear that he was acting according to his convictions in protecting the rights of the accused. The defense now urges that the judge was endeavoring to punish counsel's disobedience, but such a characterization, even if apt, adds nothing significant to his over-all purpose; and as to this the defense elsewhere states, "It is undeniable that the trial court was concerned with protecting the rights of the appellant." It is to be noted that the defendant made the original objections leading to the order of mistrial and that he made or attempted no protest to the order itself, but accepted the benefit of the new trial. We have the issue, therefore, whether active and express consent—something beyond acquiescence—is required to prevent this defendant, now convicted after a concededly fair trial, from receiving absolution for his crime by reason of the overzealousness of the trial judge on his behalf. A majority of this court concludes that the federal law does not so command.

The mandate of the Fifth Amendment to the United States Constitution is "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *." In considering whether the declaration of a mistrial precludes a subsequent prosecution for the same offense the Supreme Court has rejected any rigid formularization of the constitutional requirement in favor of a flexible application of the prohibition. *Wade* v. *Hunter*,

336 U. S. 684, 690. This approach originated in *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580, where Justice Story stated: "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." This controlling principle was succinctly reiterated in *Brock* v. *North Carolina*, 344 U. S. 424, 427:

> "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. *Wade* v. *Hunter*, 336 U. S. 684; *Thompson* v. *United States*, 155 U. S. 271, 273-274. As was said in *Wade* v. *Hunter*, *supra*, p. 690, 'a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.' "

To the same effect are *Lovato* v. *New Mexico*, 242 U. S. 199; *Simmons* v. *United States*, 142 U. S. 148; *United States* v. *Cimino*, 2 Cir., 224 F. 2d 274; *United States* v. *Potash*, 2 Cir., 118 F. 2d 54, certiorari denied *Potash* v. *United States*, 313 U. S. 584; *Scott* v. *United States*, D. C. Cir., 202 F. 2d 354, certiorari denied 344 U. S. 879; *United States* v. *Giles*, D. C. W. D. Okl., 19 F. Supp. 1009. It is to be noted that in none of these cases is the element of consent by the accused held necessary to obviate the constitutional bar; in fact, they are authority for the con-

trary view. Actually in several the mistrial had been declared either on the motion of the prosecution or by the court of its own motion, but over the vigorous opposition of the defense; this was the situation in the *Simmons*, *Scott*, and *Giles* cases, as well as in the *Brock* case, which concerned a state conviction reviewed under the Fourteenth Amendment.[4] In yet others, as in *Lovato*, *Cimino*, and *Potash*, it had been declared on the government's or the court's motion, with no showing of express consent by the accused. In all these the ultimate conviction was upheld against the plea of double jeopardy.

The defendant relies on *Himmelfarb* v. *United States*, 9 Cir., 175 F. 2d 924, certiorari denied 338 U. S. 860, as showing the need of consent; but such was not the court's approach there. Accepting the now well settled view that waiver or consent by the defendant barred his later resort to the plea,[5] the court first considered and held ineffective a waiver by counsel without his client's specific assent. Having thus cleared the way, it passed to the "real issue presented," which was "whether or not there was a legal necessity supporting the discharge of the first jury." And this it considered at considerable length with a wealth of learning and citation of authority, con-

[4] So in *Forman* v. *United States*, 361 U. S. 416, where the Court of Appeals had originally reversed a conviction and directed an acquittal, but later modified this to direct a new trial, on motion of the government and against defense objection, the Supreme Court rejected the plea of double jeopardy.

[5] See, e.g., *Blair* v. *White*, 8 Cir., 24 F. 2d 323; *Barrett* v. *Bigger*, D. C. Cir., 17 F. 2d 669, certiorari denied 274 U. S. 752; *United States* v. *Harriman*, D. C. S. D. N. Y., 130 F. Supp. 198, 204, notwithstanding Mr. Justice Holmes' view to the contrary stated in *Kepner* v. *United States*, 195 U. S. 100, 136.

cluding: "We think the court did not abuse its discretion." So the denial of the plea was upheld and the conviction was *affirmed*. To similar effect are cases such as *Ex parte Glenn*, C. C. N. D. W. Va., 111 Fed. 257, reversed on other grounds *Moss* v. *Glenn*, 189 U. S. 506, and *United States* v. *Watson*, D. C. S. D. N. Y., 28 Fed. Cas. No. 16,651. Thus while consent may bar resort to the plea, its absence does not relieve the judge of responsibility and discretion to discontinue a particular trial when justice so requires. *Wade* v. *Hunter*, *supra*, 336 U. S. 684, 689.

The law as thus stated comports more with our fundamental concepts of the federal administration of criminal justice than does the rigid and inflexible rule contended for by the accused. It has been a source of pride federal-wise that a United States district judge is more than a mere automaton or referee and bears an affirmative responsibility for the conduct of a criminal trial. This responsibility is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal. If the accused retains essentially a power of veto on pain of ban of all prosecution, even though fully justified, it is clear that the judge does not retain control of his courtroom and cannot act as he thinks necessary either to protect the interests of the litigants or to preserve proper respect for federal law administration. Even though there may be a rare case where in retrospect the judge may seem to have been overzealous in his protection of the rights of an accused, we think the law is better served by the preservation of the responsibility which the federal precedents impose upon him.

On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trials for essentially the same offense.[6] On the other hand, for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily

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[6] See full discussion in *United States* v. *Sabella*, 2 Cir., 272 F. 2d 206, and *Green* v. *United States*, 355 U. S. 184, a 5–4 decision where the two opinions are notable for their historical exegesis of the plea. The question in *Green* was as to jurisdiction, after reversal on appeal, to retry the accused for the greater offense of which he had been originally acquitted. But the majority, in sustaining the plea and pointing out that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict," reiterate, 355 U. S. at page 188: "At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances * * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter*, 336 U. S. 684, 688-689." In *United States* v. *Whitlow*, D. C. D. C., 110 F. Supp. 871—a case criticized in 67 Harv. L. Rev. 346 (1953) for inflexibility—the court upheld the plea when the mistrial had been declared because of the misconduct of the defendant's counsel.

in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future.

I am authorized to say that Chief Judge Lumbard and Judges Moore and Friendly concur in this opinion.

Conviction affirmed.

WATERMAN, *Circuit Judge* (dissenting):

It is quite clear that the district judge, on February 4, 1959, ordered a mistrial because of actions which he believed to constitute trial misconduct on the part of the Assistant United States Attorney.[1] Accordingly, it must first be asked if a mistrial for this reason may be ordered by a district judge, acting entirely *sua sponte*, without giving rise subsequently to valid plea of former jeopardy under the Fifth Amendment. If not, a second question arises: did the defendant here expressly or impliedly request or consent to the mistrial order? I believe that both these questions must be answered in the negative, and therefore I dissent.

The former jeopardy clause of the Fifth Amendment reads as follows: "• • • nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; • • •". The clause consistently has been interpreted not only to forbid multiple punishment for the same offense but also to forbid successive exposures to a single punishment. *United States* v. *Ball*, 163 U. S. 662, 666-71 (1896); *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 169 (1873 Term); and see also *United States* v. *Sabella*, 272 F. 2d 206, 208-10 (2 Cir. 1959). Thus, once a jury has been impaneled

[1] The district judge stated: "I declare a mistrial because of the conduct of the district attorney."

and sworn[2] it is said jeopardy attaches, and if a mistrial is then ordered, subsequent prosecution is barred, *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Bassing* v. *Cady*, 208 U. S. 386, 391 (1908); *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), *cert. denied*, 299 U. S. 610; *Cornero* v. *United States*, 48 F. 2d 69 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587 (W. D. Mo. 1890), *app. dismissed*, 189 U. S. 789, unless the defendant has consented to the mistrial order, *Blair* v. *White*, 24 F. 2d 323 (8 Cir. 1928); *Barrett* v. *Bigger*, 17 F. 2d 669 (D. C. Cir. 1927), *cert. denied*, 274 U. S. 752; *United States* v. *Harriman*, 130 F. Supp. 198, 204 (S. D. N. Y. 1955). It is settled that a plea of former jeopardy does not lie when a mistrial is ordered because of the jury's inability to reach an agreement after submission, *Keerl* v. *Montana*, 213 U. S. 135 (1909); *Dreyer* v. *Illinois*, 187 U. S. 71, 84-87 (1902); *Logan* v. *United States*, 144 U. S. 263, 297-98 (1892); *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579 (1824 Term), or when a juror is discovered to be incompetent or becomes incapacitated, *Thompson* v. *United States*, 155 U. S. 271 (1894); *Simmons* v. *United States*, 142 U. S. 148 (1891); *United States* v. *Potash*, 118 F. 2d 54 (2 Cir. 1941), *cert. denied*, 313 U. S. 584; *United States* v. *Haskell*, 26 Fed. Cases No. 15, 321 (E. D. Pa. 1823 Term). There are also cases disallowing the plea of former jeopardy when the mistrial order resulted from the courtroom conduct of particular persons.

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[2] In a non-jury case it is stated that jeopardy attaches once the defendant has pleaded and the court has begun to hear evidence. *Clawans* v. *Rives*, 104 F. 2d 240, 242 (D. C. Cir. 1939); *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), cert. denied, 299 U. S. 610.

Appendix B

Prior to this case the prosecuting attorney has not been included in this group. See *United States* v. *Cimino*, 224 F. 2d 274 (2 Cir. 1955) (exclamations of a juror); *Scott* v. *United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881 (withdrawal of associate counsel appointed by the court); *United States* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937) (exclamations of a trial judge questioning Government's good faith in prosecuting); but cf. *United States* v. *Whitlow*, 110 F. Supp. 871 (D. C. D. C. 1953) (misconduct of defendant's counsel held too minor to nullify plea of former jeopardy). For reasons to be set forth subsequently I am of the opinion that a mistrial ordered because the trial judge believed that the prosecuting attorney was guilty of misconduct presents a different problem than that presented in these cases.

All the cases purporting to be exceptions to the rule that a mistrial may not be ordered without the defendant's consent "once jeopardy has attached" rely upon the authority and rationale of *United States* v. *Perez*, *supra*. There, at page 580, Justice Story said:

> "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very

> plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office."

Without in any way disagreeing with the result in the *Perez* case or with the results in the cases which have relied upon it, I submit that as a guide for determining when subsequent prosecution is to be barred by the former jeopardy clause of the Fifth Amendment, Justice Story's discussion in *Perez* is analytically inadequate. If the former jeopardy clause is to be taken seriously as a constitutional right of criminal defendants and if one accepts the principle that jeopardy attaches at the commencement of trial, it defies analysis to hold that this constitutional right can *always* be nullified by some discretionary act on the part of the judge at the first trial.[3] The inadequacy of such a "discretionary" rationale becomes peculiarly apparent in the present case. The majority opinion is at pains to demonstrate the propriety of the Assistant United States Attorney's conduct. They state that the Assistant United States Attorney did nothing to instigate a mistrial, that he merely performed his assigned duties "under trying conditions."

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[3] In *Cornero* v. *United States*, 48 F. 2d 69, 72 (9 Cir. 1931) it was suggested that when the *Perez* opinion referred to the discretion of the trial judge it contemplated the discretion involved in determining how long the jury should be required to deliberate prior to its discharge for having failed to reach a verdict.

Appendix B

The action of the district judge in ordering the mistrial, expressly characterized as "over-assiduous" and "over-zealous," is thus clearly regarded by my colleagues as having been a mistaken action. How then can it be said that the district judge did *not abuse* his discretion in ordering a mistrial? I cannot follow my colleagues on this issue; the result they reach is to me a *non sequitur*. However, my dissent is based upon other grounds, for I believe the question before us should be resolved without any reliance whatever upon amorphous principles of discretion.

Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the one case where the trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. *United States* v. *Ball*, 163 U. S. 662, 669-70 (1896). As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a "nolle prosequi" during the trial without the bar of former jeopardy attaching. See *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Cornero* v. *United States*, 48 F. 2d 69, 71 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587 (W.D. Mo.), reversed on other grounds, 43 Fed. 661 (C.C.W.D. Mo. 1890), *app. dismissed sub nom Ulrich* v. *McGowan*, 149 U. S. 789 (1893); *United States* v. *Shoemaker*, 27 Fed. Cases No. 16,279 (D. Ill. 1840); and cf. Frankfurter, *J.*, concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 428-29 (1953). Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not

deprive a defendant without his consent of the right to have that trial completed.

So far as I have been able to discover, of the cases permitting retrial subsequent to a mistrial that had been ordered after the initial trial had begun, in only two have the factors that produced the mistrial order been within the control of the prosecution. These two cases are *Wade* v. *Hunter*, 336 U. S. 684 (1949), *reh'g denied*, 337 U. S. 921, and *Lovato* v. *New Mexico*, 242 U. S. 199 (1916) and neither case contradicts the conclusion expressed in the preceding paragraph. *Wade* v. *Hunter* involved court martial proceedings initiated at the front during the invasion of Germany during the Second World War. There the Court, at pages 691-92, found "extraordinary reasons" justifying adjournment of the first trial. The circumstances of the *Wade* case would appear to objectively preclude any possibility that the adjournment ordered there resulted from a fear that the trier of fact would decide against the prosecution. Similarly, the abuse was objectively impossible under the facts in *Lovato*. There the identical jury which had been discharged so that the defendant could be arraigned prior to trial was reimpaneled to hear the case after the defendant's arraignment.

The references throughout this opinion to "misconduct" on the part of the Assistant United States Attorney should not be taken as indicating that, on this point, I am in accord with the District Judge and, with him, believe that the conduct of the Assistant United States Attorney was improper. I agree with my colleagues that the Assistant United States Attorney attempted conscientiously to present his case in a manner consistent with the rulings of the

district judge. However, the significant fact is the district judge's belief. This erroneous belief deprived appellant of his right to take his case to the jury as the jury was then constituted. It is implicit in the former jeopardy clause that, as in criminal proceedings generally, the injurious consequences of erroneous rulings by the trial judge have to be borne by the prosecution rather than by the defendant.

Furthermore, although we reach contrary conclusions, I agree with my colleagues that the correct disposition of the issue before us does not depend upon whether the district judge was acting to protect the defendant or whether he was acting to punish imagined disobedience. If the former, I maintain that the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice; his retrial should not be permitted. If the latter, I think it equally clear that the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights.

I conclude that a district judge, acting *sua sponte*, does not have power to order a mistrial because of trial misconduct by the prosecuting attorney without giving rise to a sustainable plea of former jeopardy should retrial be attempted. Thus it becomes necessary to consider whether this appellant in some manner may be said to have consented to the mistrial order.

Although I find the court's opinion unclear on this point, it may be that my colleagues imply consent from two actions by appellant during the trial. My colleagues mention the

fact that appellant made objections which might have led to the mistrial order, and they also mention that he did not protest the order itself.

As to the first ground, objections to testimony cannot be said to constitute consent to a subsequent mistrial order, for objections to testimony obviously assume that the trial is to continue. Moreover, as a matter of policy, I oppose a rule that would inhibit defense counsel from making objections during a trial lest, by objecting, counsel be found to have consented, in advance, to a mistrial order. Finally, I think the part of the defendant's objections played in leading to the mistrial order in the present case has been overemphasized in the court's opinion.[4]

As to the contention that consent may be implied from appellant's failure to object to the mistrial order, similar contentions were made and rejected in *Himmelfarb* v.

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[4] My colleagues refer to the defense's "continuous formal objections." This is misleading. At the morning session only did the defense interpose frequent objections. The first government witness, the shipper's traffic manager, was then testifying. Primarily these objections were directed to the admissibility of certain bills of lading. The district judge consistently overruled the defense, and the frequency of the objections was caused in part from the district judge's admonition to the defense to preserve this point. The district judge did not display notable impatience with the conduct of the Assistant United States Attorney or rule favorably to the defense until the abbreviated testimony of the third and fourth government witnesses, the two FBI agents, who testified in the afternoon. The district judge's displeasure with the trial conduct of the Assistant United States Attorney during their examination, a displeasure that I join my colleagues in being unable to account for, was not instigated by defense counsel, whose role during this portion of the trial was entirely passive. The trial record discloses that neither counsel anticipated the course so suddenly taken and that the withdrawal of the juror must have been as much of a surprise to defense counsel as it was to the Assistant United States Attorney.

United States, 175 F. 2d 924, 931-32 (9 Cir. 1949), *cert. denied*, 338 U. S. 860; *Ex parte Glenn*, 111 Fed. 257, 259 (N. D. W. Va. 1901), *rev'd on other grounds*, 189 U. S. 506; *United States* v. *Watson*, 28 Fed. Cases No. 16,651 (SDNY 1868). Under different circumstances than here present one court may have implied consent from a failure to object to a mistrial order. In *Scott* v. *United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881, during the absence of the jury but in the presence of the defendant and his attorney, the trial judge stated he had decided to declare a mistrial. The jury was then called back into the courtroom and the order announced. During this time no objection was made. In the present case, however, the possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from appellant's failure to protest.

I would reverse with directions to dismiss the information.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Petition filed August 5, 1960 Decided August 18, 1960.)

Docket No. 26048

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANTE EDWARD GORI,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*, and

CLARK, WATERMAN, MOORE, and FRIENDLY, *Circuit Judges.*

On Petition of Appellant for Rehearing

JEROME LEWIS, Brooklyn, N. Y., *for appellant.*

PER CURIAM:

On the merits of this appeal we find nothing to add to the discussions already had. Appellant, however, objects to the procedure *in banc* followed here and claims a right of oral argument. This is a point we should discuss, since

counsel generally should be apprised of our procedure so far as we have developed it. There is of course nothing secret as to our processes of advancing a case to the point of adjudication.

We have recently adopted our Rule 25(b) dealing with petitions for rehearing. This reads as follows:

> "(b) *Disposition.* Any petition for rehearing shall be addressed to the court as constituted in the original hearing. It shall be disposed of by the court as so constituted unless a majority of said court or any active judge of this court, either from a suggestion by petitioner or *sua sponte,* shall be of the opinion that the case should be reheard in banc, in which event the Chief Judge shall cause that issue to be determined by the active judges of this court. Rehearing, whether by the court as constituted in the original hearing or in banc, shall be without oral argument and upon the papers then before the court, unless otherwise ordered." (Eff. April 25, 1960.)

But additionally the court reserves the right, as the statute, 28 U. S. C. §46(c), provides, to proceed *in banc* whenever a majority of the active judges think such course in the interest of justice and so vote. This necessarily involves the exercise of discretion in each particular case and we have kept formal rules to a minimum. So when the procedure *in banc* has been voted, we have proceeded to decision on only the original papers, *McWeeney* v. *New York, N. H. & H. R. Co.*, 2 Cir., July 29, 1960; *Sperry Rand Corp.* v. *Bell Telephone Laboratories,* 2 Cir., 272 F. 2d 29; *Mueller* v. *Rayon Consultants,* 2 Cir., 271 F. 2d 591; *Reardon* v. *California Tanker Co.,* 2 Cir., 260 F. 2d 369, 375, certiorari denied *California Tanker Co.* v. *Reardon,* 359 U. S. 926;

Appendix C

F. & M. Schaefer Brewing Co. v. *United States*, 2 Cir., 236 F. 2d 889, reversed *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227, or on the mere filing of additional briefs, *American-Foreign S.S. Corp.* v. *United States*, 2 Cir., 265 F. 2d 136, 144, vacated and remanded *United States* v. *American-Foreign S.S. Corp.*, 80 S. Ct. 1336; *In re Lake Tankers Corp.*, 2 Cir., 235 F. 2d 783, affirmed *Lake Tankers Corp.* v. *Henn*, 354 U. S. 147, or after full oral argument, *Pugach* v. *Dollinger*, 2 Cir., 277 F. 2d 739, certiorari granted 80 S. Ct. 1614; *United States* v. *Coppola*, 2 Cir., May 20, 1960; *U. S. ex rel. Marcial* v. *Fay*, 2 Cir., 247 F. 2d 662, certiorari denied *Fay* v. *U. S. ex rel. Marcial*, 355 U. S. 915; *U. S. ex rel. Roosa* v. *Martin*, 2 Cir., 247 F. 2d 659; *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d 416, certiorari denied *Apuzzo* v. *United States*, 355 U. S. 831; and *United States* v. *Santore*, not yet decided. Thus we have no set rule in this regard, but are guided by what we conclude are the needs of a particular case.

These various cases presented all the questions here adverted to, including the supersession of retired or visiting judges by a court comprised of only the active judges. As appears above, the Supreme Court passed upon many of the cases in their substantive aspects, but without raising any question as to the procedure. Petitioner has no absolute right to oral argument; where, as here appeared, the researches of the court and its staff had proceeded beyond that disclosed in the briefs of counsel, further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned.

Petition denied.

No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1960

DANTE EDWARD GORI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the Court of Appeals are not yet reported (Pet. 5a, 24a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1960, and a petition for rehearing was denied on August 18, 1960. Mr. Justice Harlan extended the time for filing a petition for writ of certiorari to and including October 17, 1960, and the petition was filed on October 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, following a mistrial declared by the district judge *sua sponte,* petitioner could be retried.

2. Whether the procedure adopted by the Court of Appeals in hearing petitioner's appeal *en banc* was proper.

STATEMENT

Petitioner was charged in the United States District Court for the Eastern District of New York with the crime of receiving and having possession of goods stolen in interstate commerce, knowing the same to have been stolen (18 U.S.C. 659). During the presentation of the government's case, on the first day of trial, February 4, 1959, District Judge Abruzzo, *sua sponte,* declared a mistrial for what he characterized as misconduct of the United States Attorney.[1]

On March 9, 1959, petitioner moved to dismiss the information on the grounds of double jeopardy. The motion was denied on March 26, 1959. Petitioner was retried in April, 1959, found guilty, and sentenced to imprisonment for three and one-half years.

On appeal, the sole question raised was whether petitioner's retrial constituted double jeopardy. Argument was heard by a panel consisting of Circuit Judges Clark and Waterman and Circuit Judge Lewis of the Tenth Circuit (sitting by designation). In a preliminary draft opinion, Judges Waterman and Lewis voted to reverse and Judge Clark voted to affirm the conviction. The divergent draft opinions

[1] The proceedings leading up to the declaration of mistrial are set forth on pages 6–7 of the petition for writ of certiorari. All the judges in the court below were of the view that the prosecutor had not committed any act of misconduct.

were circulated among the active judges of the court, and a majority of these judges, "believing that the case presented a general problem important to the administration of justice" in the Second Circuit, voted to dispose of the appeal *en banc*. Judge Lewis, not being a member of the Court of Appeals for the Second Circuit, was excused from further participation. On July 22, 1960, the Court of Appeals *en banc*, by a 4–1 vote, affirmed the conviction.

ARGUMENT

1. Petitioner himself states that the basic rules which determine the issue "are plain" (Pet. 10). It is well established that, even though a defendant has been on trial before a jury and in that sense in jeopardy, he may be retried after the trial judge has declared a mistrial in the interest of justice, as, for example, where it is discovered during the course of a trial that a juror may be biased. *Thompson* v. *United States*, 155 U.S. 271; *Simmons* v. *United States*, 142 U.S. 148. And see *Wade* v. *Hunter*, 336 U.S. 684; *United States* v. *Perez*, 9 Wheat. 579. In our view, the decision below correctly applies this settled principle to a special set of facts, and further review is not warranted.

a. In this case, the trial judge declared a mistrial apparently because he believed that the prosecutor was about to engage in a line of questioning which would be prejudicial to the defendant (see opinion of the court below, Pet. 9a–10a). The judges below were of the view that the prosecutor had not engaged in any misconduct and that the district judge had been "over-

assiduous" in his efforts to safeguard "the rights of the accused" (Pet. 10a). But whether in this particular case the trial judge had tenable reasons for declaring a mistrial or whether (as we believe) he erred on the side of solicitude for the defendant, we submit (1) that the freedom of the district judge to make the judgment whether the trial ought continue—a matter traditionally within his broad discretion (*Wade* v. *Hunter, supra; United States* v. *Perez, supra*)—is to be encouraged and preserved, and (2) that the exercise of this discretion by the district judge, whether he acts with questionable judgment or with unimpeachable wisdom, should not serve (at least in the absence of most exceptional circumstances) to defeat the judicial process and to immunize the defendant from the necessity of having his guilt or innocence determined.

This view does not involve a conflict with the prohibition against double jeopardy. As this Court stated in *Green* v. *United States*, 355 U.S. 184, 187–188, the rationale of the constitutional prohibition is that:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

Petitioner is not, either in the traditional sense or in any meaningful sense, a victim of double jeopardy; he has not been harassed by the government through

unjustified and constant persecution after the government failed to prove guilt on the first attempt. To the contrary, the government was never given the chance to prove its case in the first trial, even though it was prepared to do so. Petitioner's "valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689.

b. Petitioner, relying on the dissent below, suggests that if the ruling of the trial judge with respect to the necessity for a new trial be accepted, then the assumed cause of that ruling—misconduct of the prosecutor—must also be accepted. He then argues that, whenever a mistrial results from the conduct of the prosecutor, a defendant cannot be retried unless he himself has affirmatively waived double jeopardy by moving for a mistrial. This argument attempts to do what this Court in *Wade* v. *Hunter*, 336 U.S. 684, 691, said should not be done—to codify the rules of manifest necessity and double jeopardy into a rigid abstract formula. With respect to the suggestion (based on *Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9), cited by petitioner (Pet. 14–16)) that absence of witnesses can never justify discontinuance of a trial, this Court said (336 U.S. at 691):

> Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid

the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

We suggest that the same flexibility must govern the determination whether a retrial is permissible. We do not believe that any slip by a prosecutor which might induce the presiding judge to conclude that it was best to declare a mistrial should carry the consequence that guilt is never to be determined. If there is reason to believe that a prosecutor has deliberately provoked a mistrial in order to prevent an unfavorable verdict, it might, in that circumstance, be proper to hold that the mistrial was for the convenience of the prosecution[2] and represented the type of harassment which the double jeopardy clause was designed to prevent. But since admittedly there is no basis here for suggesting that the prosecution deliberately provoked a mistrial, there is no occasion to speculate as to the circumstances in which misconduct by the prosecution might conceivably be deemed to bar a second trial. It is enough to note that this Court has clearly rejected the type of rigid formula which petitioner suggests and that here there is no reason whatever to impute improper motives to the prosecution.

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[2] The cases which held that retrial, following a mistrial, was barred were cases in which the mistrial was for the convenience of the prosecution, *e.g.* where the prosecutor entered a *nolle prosequi* because his evidence was insufficient (*Clawans* v. *Rives*, 104 F. 2d 240 (C.A. D.C.)), or where the prosecution proceeded without having all its witnesses present (*Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9).

c. The question of waiver by consent does not play a part in this case. Of course, if petitioner had moved for a mistrial, he would have waived the possibility of a plea of double jeopardy.[3] A judge, however, may declare a mistrial in the interests of fairness or necessity, even over the objection of a defendant.[4] This is clear from *Simmons* v. *United States,* 142 U.S. 148, 150, where this Court upheld a retrial after a mistrial declared over the express objection of the defendant. See, also, *Scott* v. *United States,* 202 F. 2d 354 (C.A. D.C.), certiorari denied, 344 U.S. 879. If the rule were otherwise there could be a multiplication of situations, such as that presented in *Scott,* where a defendant claiming serious disadvantage from a ruling nonetheless refuses to move for a mistrial (presumably hoping to secure a reversal on appeal in the event of a conviction). A trial judge must be the ultimate arbiter. The function of determining whether a fair trial is possible cannot be delegated either to the prosecution or to the defense. Accordingly, it cannot be deemed dispositive that the district judge's declaration of a mistrial is made *sua sponte,* rather than on motion by the defendant. As this Court said in *Wade*

[3] That obviously is what the court below referred to when it said (Pet. 10a): "We have the issue, therefore, whether active and express consent—something beyond acquiescence—is required to prevent this defendant, now convicted after a concededly fair trial, from receiving absolution for his crime by reason of the overzealousness of the trial judge on his behalf." In other words, the court below was holding that there could be a new trial without the active consent represented by a motion for a mistrial.

[4] In this case, the defendant did not object.

v. *Hunter*, 336 U.S. 684, 688–689, the constitutional right against double jeopardy does not mean that

> every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

2. Petitioner complains of the fact that this case was taken from the panel to which it was originally assigned and determined by the Court of Appeals sitting *en banc*. There is no question, however, that the determination to decide the case *en banc* was made by the majority of the active judges of the circuit, in literal compliance with 28 U.S.C. 46(c) (reprinted at Pet. 5). The administrative mechanics by which the determination was made was, of course, a matter for the Court of Appeals. *United States* v. *American-Foreign S.S. Corp.* 363 U.S. 685; *Western Pacific Railroad Corp* v. *Western Pacific Railroad Co.*, 345 U.S. 247.

Nor is there substance to petitioner's complaint that the court, sitting *en banc*, did not schedule a second oral argument. There is no constitutional right to oral argument and, as this Court has observed (*American-Foreign Case, supra*, 363 U.S. at 692), it "is not an unknown phenomenon in federal adjudication that a case, though heard by less than the entire tribunal, may be decided according to the majority vote of all." In this instance, the Court of Appeals observed (Pet.

26a) that it appeared that "the researches of the court and its staff had proceeded beyond that disclosed in the briefs of counsel" and that "further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

FILE COPY

IN THE

Supreme Court of the United States

October Term 1960

No. 486

DANTE EDWARD GORI,
Petitioner

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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32. CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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REPLY BRIEF OF PETITIONER

1. The Court below deemed the issues here so "important to the administration of justice" that it acted *in banc* in disposing of the appeal (Pet., App. B, p. 15a). We cannot, consequently, understand the Government's position that review by this Court is not warranted (Br. in Opposition, p. 3).

The basic issue—the impact of the constitutional provision as to double jeopardy in a case where a trial judge declares a mistrial without any urgent necessity therefor—is an important issue not previously considered or settled by this Court. In light of the sharp division among the judges below, there can be little doubt that the problem is a difficult one and needs resolution by this Court. Indeed,

the panel of the Court of Appeals which initially heard the case concluded that petitioner had been unconstitutionally subjected to double jeopardy and that, therefore, his conviction must be reversed; it was only after the *in banc* court intervened that the reversal was supplanted by an affirmance of the conviction.

In short, the history of this litigation below itself is persuasive for the grant of the writ by this Court.

2. The Government's position apparently is that the Federal trial judge's power to declare a mistrial and thus to subject a defendant to a second trial for the same offense must be free and virtually unhampered. It urges encouragement and preservation of a "broad discretion" in the trial court and insists that the "trial judge must be the ultimate arbiter" even though, in so terminating the earlier trial, he acts "with questionable judgment" (Br. in Opposition, pp. 4, 7). In short, what the Government contends for (and what the ruling below sanctions) is a drastic curtailment of the constitutional guarantee against double jeopardy.

Whatever the measure of the trial judge's discretion, the "grave constitutional overtones" in this case justify review by this Court. See *Grunewald* v. *United States*, 353 U. S. 391, 423-424. Beyond this, as noted in our Petition (pp. 11-16), once one permits such unbridled discretion, he necessarily negatives meaningful review and any effective enforcement of the constitutional inhibition.

In *United States* v. *Perez*, 9 Wheat. 579, 580, this Court decreed that the power of the trial judge "ought to be used with the greatest caution, under urgent circumstances,

and for very plain and obvious causes . . . ." That caveat remains timely. The trial court's discretion, by declaration of mistrial, to subject a defendant to a second trial is a narrow one, to be exercised only in "urgent circumstances".

We believe that when it seeks to expose an accused to the jeopardy of a second trial, the Government has the burden of justifying the retrial. Here, however, the Government would shift the burden to the defendant. It would sanction retrial in a Federal criminal prosecution, even where the court may have erred in terminating the earlier trial, unless the defendant were able to show "most exceptional circumstances" why he should not be again tried (Br. in Opposition, p. 4). We insist, however, that the Constitution may not thus be watered down. Such a niggardly reading is in effect a negation of the inhibition against double jeopardy.

3. Relying on Judge Waterman's dissent, we have urged that, unless a defendant himself requests or consents to such action, a trial judge should not be permitted to declare a mistrial because of a prosecutor's misconduct and then subject an accused to a second trial (Pet., pp. 16-20). The Government condemns this argument as an attempt, contrary to *Wade* v. *Hunter*, 336 U. S. 684, 691, "to codify the rules of manifest necessity and double jeopardy into a rigid abstract formula" (Br. in Opposition, p. 5).* Our

* The Government also complains (*ibid.*) that our argument assumes misconduct of the prosecutor notwithstanding that there appears to have been no such misconduct. But if, in fact, the prosecutor was not guilty of misconduct, the declaration of mistrial and the imposition on petitioner of a second trial are *a fortiori* indefensible.

argument, however, is in no sense an abstract formulation. What we are contending for—and what Judge Waterman urged—was recognition and protection of the accused's right to assistance of counsel, which the Sixth Amendment guarantees. The Government ignores the strictures of that Amendment.

We do not say that a prosecutor's misconduct may never properly serve as a basis for a mistrial. In most cases, the defendant, through counsel, will object to such misconduct and demand a mistrial, or, invited by the trial judge, will consent to a mistrial. In such circumstances, of course, termination of the first trial will not bar retrial. But the choice must be with the accused. If, as the majority below suggests and the Government agrees, a trial judge may, in complete disregard of the attitude of the defendant or his counsel, "protect" the accused by declaring a mistrial and subjecting him to the jeopardy of a second trial, a defendant will be deprived of the effective assistance of counsel which the Constitution assures. This is the serious issue which, among others, the decision below presents and which should be settled by this Court.

4. We are mindful, as the Government notes (Br. in Opposition, p. 8), that the mechanics of the *in banc* disposition of appeals by the Second Circuit Court is a matter primarily for that Court. This Court has directed, however, that whatever procedure may be adopted "should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it . . ." *Western Pacific Railroad Case*, 345 U. S. 247, 267. The court below has ignored that direction. Initial *in banc* dispositions of appeals are handled on an *ad hoc*

basis. Where, as here, such a procedure involves "discharge" of a judge who has heard the case and has voted for reversal of the conviction, and then decision by the *in banc* Court, without affording the defendant-appellant an opportunity to reargue before that court, serious due process problems arise and require examination by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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FILE COPY

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BRIEF FOR PETITIONER

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UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

Opinions Below

The opinions of the Court of Appeals on the appeal from the conviction of petitioner (R. 20-34) and on the petition for rehearing (R. 36-38) are reported at 282 F. 2d 43. The opinion of the United States District Court for the Southern District of New York denying petitioner's motion to dismiss the information on the plea, *inter alia*, of double jeopardy (R. 15-17) has not been reported. The District Court rendered no other opinion.

Jurisdiction

The judgment of the Court of Appeals affirming the conviction of petitioner (R. 35) was entered on July 22, 1960. It's order denying the petition for rehearing (R. 38) was

entered on August 18, 1960. After grant of an extension of time (R. 39), the petition for a writ of certiorari was filed on October 15, 1960, and granted on December 12, 1960, limited to the question of double jeopardy presented by the petition (R. 39; 364 U. S. 917 [prelim. print]). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a defendant in a criminal case in the Federal courts may constitutionally be subjected to the jeopardy of a second trial where his earlier trial for the same offense terminated in a mistrial declared without his request or consent and:

(a) where the record discloses no "manifest necessity" for the declaration of mistrial;

(b) where there is, in fact, no "manifest necessity" for the declaration of mistrial; and

(c) where the trial judge believes that the prosecutor is about to engage in misconduct and abruptly declares a mistrial in the presence of the jury presumably in order to protect the rights of the defendant although the defendant is not consulted.

2. Whether the authority of the district judge to declare a mistrial, without the bar of former jeopardy attaching, is a discretionary authority reviewable by the appellate courts or an absolute and unreviewable authority.

3. If the authority is a discretionary authority, whether the declaration of a mistrial by the district judge in this case was in his sound discretion.

4. Whether the misconduct of a prosecutor can in any event afford the basis for the declaration of a mistrial by a district judge without the bar of former jeopardy attaching, where the defendant neither requests nor consents to the mistrial.

5. Whether the failure of a defendant formally to object to the district judge's abrupt declaration of a mistrial, in the presence of the jury and without first consulting with or inviting the expression of opinion by the defendant, constitutes a waiver by the defendant of his right to be free from subjection to double jeopardy for the same offense.

Constitutional Provision Involved

The Fifth Amendment to the Constitution is involved.

Statement of the Case

Petitioner, charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U.S.C. 659, was placed on trial before a jury in the United States District Court for the Eastern District of New York on February 4, 1959.[1] The Government proceeded with its case during the morning and early afternoon of that day. In the afternoon, during the examina-

[1] The information was in one count; it charged petitioner and one Franklin Osborne Corbett with having received and having had in their possession twenty-two cases of women's and children's gloves known to be stolen. Corbett pleaded guilty, and petitioner not guilty (R. 1-2). The opening trial statement of petitioner's counsel disclosed that petitioner would claim that he had acted without knowledge that the goods in question were stolen and only as Corbett's hired employee (R. 3).

tion of the Government's fourth witness, and without affording either party an opportunity to address himself to the propriety of such action, the district judge *sua sponte* declared a mistrial "because of the conduct of the district attorney (R. 13-15). As the court below notes, the record does not "make entirely clear the reasons which led the judge to act" (R. 24). The colloquy immediately preceding the declaration of mistrial appears in the margin.[2]

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[2] PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Passalacqua:

"Q. Mr. Deery, how long have you been an agent of the F.B.I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

"Mr. Passalacqua: Your Honor, I think—please allow me—

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

After the mistrial, petitioner moved to dismiss the information on the plea of former jeopardy (R. 4-5). That motion was denied, and petitioner was subjected to retrial on the same information before another judge and jury.[3] Petitioner reasserted his plea of former jeopardy. The case was nevertheless submitted to the jury, and a verdict

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"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has already been answered, February 10th.

"Q. When did you see him for the second time? A. February...

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? He met another individual.

"Q. Where did you see him on February 11th?

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is alright with me. That's all" (R. 13-14).

[3] Although the opinion denying the motion for dismissal (R. 15-17) was filed on March 26, 1959, the order was entered on that opinion on July 22, 1959 (R. 19), several months after the entry of the judgment of conviction on the retrial (R. 18).

of guilty returned. On April 30, 1959, the judgment of conviction was entered and petitioner sentenced to imprisonment for a term of three and one-half years (R. 18).

Appeals were thereupon taken from the judgment of conviction and the order denying the motion to dismiss the information. The appeals were heard together before a panel of the Court of Appeals consisting of Judges Clark, Waterman and Lewis (the latter, a judge of the Tenth Circuit, sitting pursuant to statutory designation). In conference, Judges Waterman and Lewis voted to reverse and Judge Clark to affirm. Draft opinions reflecting that disagreement were then circulated among the active judges of the court. Although Judge Clark disagreed, noting that the procedure appeared "not to be a settled practice in other circuits", a majority of the active judges voted for an *in banc* disposition of the appeals, "superseding the judgment" of Judge Lewis (R. 21). On July 22, 1960, four active judges voting to affirm, Judge Waterman dissenting and Judge Lewis no longer participating, the court handed down its judgment affirming petitioner's conviction (R. 35).

The majority of the court was of the opinion that, although "the prosecutor did nothing to instigate the declaration of a mistrial and . . . was only performing his assigned duty under trying conditions", although the record does not "make entirely clear the reasons which led the judge to act," and although "the judge should have awaited a definite question which would have permitted a clear-cut ruling . . . [and] was thus over-assiduous, . . . it seems clear that he was acting according to his convictions in protecting the rights of the accused" (R. 23-24).

It concluded therefore that, notwithstanding that petitioner neither requested a mistrial nor consented thereto, petitioner was not so placed in jeopardy by the first trial as to preclude retrial and conviction for the same offense. Judge Waterman dissented, pointing out that, even on the rationale of the majority's opinion, the district judge's declaration of mistrial constituted an abuse of discretion and insisting further that "misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed" (R. 30-31).

A petition for rehearing was filed on the grounds, *inter alia*, that the *in banc* procedure as here applied was improper and that the court was mistaken on the issue of double jeopardy. That petition was denied by *per curiam* opinion on August 18, 1960 (R. 36-38).

This Court granted certiorari, limited to the question of double jeopardy presented by the petition (R. 39; 346 U. S. 917 [prelim. print]).

Summary of Argument

A trial judge, in the exercise of his sound discretion, may declare a mistrial and subject the defendant to a second trial only in those cases where circumstances of "manifest necessity" or the ends of public justice compel an early termination of the first trial. *United States* v. *Perez*, 9 Wheat. 579. In this case, however, no necessity whatever, let alone "manifest necessity", appears for the mistrial. The considerations that moved the trial judge to act are articulated, if at all, so vaguely as to leave the court

of appeals itself in a quandary. The ruling below in effect vests absolute power in the trial judge to declare a mistrial and to subject the defendant to the jeopardy of a new trial. The decision thus marks a radical departure from, if not complete abandonment of, the *Perez* doctrine and disregards the high position that the double jeopardy cause still occupies in the fabric of our constitutional liberties. The court below directs us to no special circumstances or overriding considerations of policy which would justify so drastic a curtailment of the constitutional right.

In any event, misconduct by a prosecutor cannot constitutionally justify declaration of a mistrial and retrial of the defendant unless first he has consented to the mistrial. This rule avoids the serious constitutional question presented, in view of the Sixth Amendment guarantee of effective counsel, by declaration of a mistrial without the defendant's consent. It prevents the unilateral provocation of a mistrial by a prosecutor intent on avoiding a probable acquittal. It leaves the choice of exposure ~~between~~ to the jeopardy of successive trials ~~and~~ or protection from the prejudice resulting from prosecutor misconduct where the choice properly belongs, to the defendant and his counsel.

Petitioner in this case did not waive his rights under the double jeopardy provision. The suddenness and vehemence of the judge's declaration of mistrial made it impossible for petitioner or his counsel to speak to it. Waiver cannot be properly inferred from their failure to object after it was too late to do so.

ARGUMENT

I.

There were no circumstances of "manifest necessity" for a mistrial in this case. Absent such circumstances, petitioner's retrial violated the double jeopardy provision of the Fifth Amendment.

The Fifth Amendment's interdiction of double jeopardy on its face seems an absolute bar: no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." Nevertheless, in *United States* v. *Perez*, 9 Wheat. 579 (1824), this Court quite early qualified the constitutional command, authorizing retrial of a defendant in a Federal criminal case after the first trial had been terminated by the trial court for the jury's failure to agree on a verdict. Since then, other exceptions have from time to time been engrafted on the constitutional provision. This Court recently summarized the present state of the law, as follows (*Green* v. *United States*, 355 U. S. 184, 188):[4]

> "'. . . This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade* v. *Hunter*, 336 U. S. 684; *Kepner* v. *United States*, 195 U. S. 100, 128. . . . This prevents a prosecutor or judge from subjecting a defen-

[4] Recent opinions announced in this Court contain comprehensive exegeses of the double jeopardy provision, its origins and its history in this Court. See *Green* v. *United States*, 355 U. S. 184; *Bartkus* v. *Illinois*, 359 U. S. 121; *Abbate* v. *United States*, 359 U. S. 187; see, also, Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960); Note, 65 Yale L. J. 339 (1956); ALI, Admin. of Crim. Law: Double Jeopardy (1935).

> dant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . arising during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter*, 336 U. S. 684, 688-689."

Perez has been "the basis for all later decisions of this Court on double jeopardy" (*Wade* v. *Hunter, supra*, 336 U. S. at 690) and has served as the touchstone of decision for all Federal courts. The *Perez* rule is, as follows (9 Wheat. at 580):

> ". . . [T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . ."

A. There were no circumstances of "manifest necessity" for a mistrial in this case.

Although the court below professes compliance with *Perez* (R. 24), its decision is irreconcilable with the principles of that ruling. For, in this case, a second trial of a defendant for the same offense is approved notwithstand-

ing that no necessity, let alone "manifest necessity", appears for the termination of the first trial before verdict.

Just why the trial court terminated the earlier trial in this case is nowhere clearly articulated. When he declared the mistrial, the trial judge said he was doing so "because of the conduct of the district attorney" (R. 14). But he did not say what that objectionable conduct was, and the attendant colloquy is not helpful. The other judges who subsequently examined the record interpreted it variously. On denying petitioner's subsequent motion for dismissal, on the plea, *inter alia*, of double jeopardy, the District Court judge wrote (R. 16):

> " . . . [T]he trial judge, apparently believing that certain questions asked of Government witnesses on direct examination were or might be prejudicial to the defendant, sua sponte exercised his prerogative and declared a mistrial. Though not sought by the defendant, the mistrial was obviously declared in his interest. . . ."

The majority of the Court of Appeals says (R. 23-24):

> " . . . [T]he prosecutor did nothing to instigate the direction of a mistrial . . . and was only performing his assigned duty under trying conditions. . . . This is borne out by the entire transcript. . . . Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. But if he was thus over-assiduous, . . . it seems clear that he was acting according to his convictions in protecting the rights of the accused. . . ."

Judge Waterman, dissenting, remarks that his colleagues in the majority "clearly regarded" the action of the trial judge "as having been a mistaken action" (R. 31).

Whatever may have been the circumstances that moved the trial judge, what is certain is that this case does not present those "very plain and obvious causes" for early termination of trial which *Perez* contemplated, nor the "urgent circumstances" which alone, *Perez* tells us, warrant exposure of an accused to a second trial after discharge of an earlier jury (9 Wheat. at 580).

We are mindful that this Court has commended the breadth and flexibility of the *Perez* ruling and has rejected as inconsistent with its spirit any effort to impose "a rigid formula" on the double jeopardy concept. *Wade* v. *Hunter*, *supra*, 336 U. S. at 690. It has, however, never suggested that the *Perez* doctrine be watered down as it has been in the decision below.

Perez, as we have noted, confines cases of "manifest necessity" for early termination of trial to such as involve "urgent circumstances" and exhibit "very plain and obvious causes" for termination. Other courts have conceived "manifest necessity" as signifying "very extraordinary and striking circumstances" (Story *J.*, in *United States* v. *Coolidge*, 25 Fed. Cas. No. 14,858); "imperious necessity" (*Ex parte Glenn*, 111 Fed. 257 (N. D. W. Va.), rev'd on other grds., 189 U. S. 506); or "most urgent necessity" (*Cornero* v. *United States*, 48 F. 2d 69, 71 (9th Cir.)). The term may connote something less than these; it certainly requires more, however, than the barren record which attended the mistrial in this case. We know of no case in which a second trial has been allowed after an earlier

mistrial where, as here, the record revealed no incident occurring at the first trial which afforded even a colorable excuse for the mistrial.

Necessity manifested is at the very least necessity *clearly evidenced*. When, as here, the considerations that moved the trial judge to action are articulated, if at all, so vaguely as to leave the reviewing tribunal itself in a quandary, "manifest necessity" is indisputably lacking. The heart of the matter is that there was no necessity whatever, let alone "manifest necessity", for the mistrial in this case.

The "prosecutor did nothing to instigate the declaration of a mistrial and . . . he was only performing his assigned duty under trying conditions" (R. 23). There is no trace of any objectionable "conduct of the district attorney", which the trial judge suggested inspired his action (R. 14). No circumstance appears which might reasonably have compelled interruption of the trial. As Judge Waterman remarks: "The action of the district judge in ordering the mistrial, expressly characterized as 'over-assiduous' and 'over-zealous', is thus clearly regarded by my colleagues as having been a mistaken action" (R. 31).

Since "manifest necessity" for the mistrial was lacking, the *Perez* standard has not been met, and the judge below is plainly in error. Beyond this, it seems clear that the trial judge in this case did not even attempt to measure the circumstances of the first trial against the standard of "manifest necessity". As he declared the mistrial, the judge exclaimed: ". . . I don't care whether the action is dismissed or not" (R. 14). Irked and angered for some undefined reason, the judge failed to exercise the discretion vested in him or to apply the standard enunciated by *Perez*

and the later rulings of this Court. The Court's failure in these respects also compels reversal of the judgment below. See *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 268; *Rogers* v. *Richmond*, No. 40, O.T. 1960, March 20, 1961.

B. The authority of trial judges to declare mistrials without the bar of former jeopardy attaching is not absolute but discretionary and reviewable by the courts of appeal.

The decision below marks a radical departure from, if not a complete abandonment of, the *Perez* doctrine. What is done is to substitute for the *Perez* rule of cautious limitation virtually an absolute power in the district courts to terminate trials and subject defendants to new trials.

That this is the meaning of the decision is confirmed by Government counsel's brief in opposition to the petition for a writ. Although, at one point, they urged encouragement and preservation of a "broad discretion" in the trial court (Br. in Opposition, p. 4), at another they made plain that what they were really supporting was the proposition that the "trial judge must be the ultimate arbiter" in declaring a mistrial even though, in doing so, he acts "with questionable judgment" (*Id.*, p. 7).

Perez, it is true, recognizes the authority in the trial judge "to exercise a sound discretion on the subject" of a trial's discontinuance. 9 Wheat. at 580. And *Brock* v. *North Carolina*, 344 U. S. 424, 427, affirms that this Court has "long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. *Wade* v. *Hunter*, 336 U. S. 684; *Thompson* v. *United States*,

155 U. S. 271, 273-274". Judicial discretion, however, is something other than untrammelled power. It is a discretion "proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors." *Barry* v. *Edmunds*, 116 U. S. 550, 566; *National Ben. Life Insurance Co.* v. *Shaw-Walker Co.*, 111 F. 2d 497, 507 (D. C. Cir.), cert. den. 311 U. S. 673; *Davis* v. *Peerless Insurance Co.*, 255 F. 2d 534, 536 (D. C. Cir.). Moreover, meaningful review contemplates intelligent articulation by the district judge of the rationale of his ruling. Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 674-675; *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80; *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 196.

In the present case, the trial judge's declaration of mistrial has not been, because it cannot possibly be, tested within the frame of judicial discretion. The record is silent, so we cannot know why the judge deemed a mistrial necessary. It has been suggested that he believed the prosecutor was *about* to ask a question prejudicial to the petitioner, but that anticipated event concededly never occurred.

The Court of Appeals supplies no justification for the trial judge's action. Finding no rational basis, the court resorts to divination and faith. It sustains the mistrial declaration solely because "it seems clear [to the majority below] that . . . [the trial judge] was acting according to *his* convictions in protecting the rights of the accused" (R. 24, emphasis supplied).

Action by a judge on personal conviction, however, is quite different from the exercise of judicial discretion. Moreover, the subjective predilections, or convictions, the

"personal and private notions" of judges are irrelevant to the adjudication of personal constitutional rights. Cf. *Rochin* v. *California*, 342 U. S. 165, 170.

When an appellate court affirms a trial judge's ruling because it accords with "his convictions", it sustains virtually an absolute power in the trial court and abdicates its own duty of intelligent and responsible review. "Sound discretion" gives way to absolute power. Certainly, a defendant in our courts is entitled to more than assurance against merely the *mala fides* of the trial court. He has a right to protection from and correction of all prejudicial error, however well intentioned.

Although *Brock* v. *North Carolina*, *supra* (on which the court below relies) speaks of a "discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served" (344 U. S. at 427), it does not say that the trial court's measure of what will serve justice is final and indisputable. In *Brock*, the appellate courts could readily examine and did examine into the trial judge's exercise of discretion; the record there plainly revealed the basis for his action: a temporary unavailability, by reason of pleas against self-incrimination, of testimony vital to the prosecution. In the present case, contrariwise, the Court of Appeals could not, nor can this Court, effectively review the mistrial declaration, for the record here does not inform us of the basis for the trial court's action.

The high position the double jeopardy clause occupies in the fabric of our constitutional liberties requires more solicitude than is here exhibited for the right. "Fear and abhorrence of governmental power to try people twice

for the same conduct is one of the oldest ideas found in western civilization." *Bartkus* v. *Illinois*, 359 U. S. 121, 151 (Black, *J.*, dissenting). The principle was "so deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, [that it] was inevitably part of the legal tradition of the English Colonists in America... [T]he First Congress, which proposed the Bill of Rights, came to its task with a tradition against double jeopardy founded both on ancient precedents in the English law and on legislation that had grown out of colonial experience and necessities. The need for the principle's general protection was undisputed, though its scope was not clearly defined. Fear of the power of the newly established Federal Government required 'an explicit avowal in [the Constitution] . . . of some of the plainest and best established principles in relation to the rights of the citizens, and the rules of the common law.' *People* v. *Goodwin*, 18 Johns. (N. Y.) 187, 202 . . ." *Green* v. *United States*, *supra*, 355 U. S. at 200, 201 (Frankfurter, *J.*, dissenting).

The purposes which the constitutional guarantee serves attest to its great significance and its continued vitality. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts. 'The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and

insecurity . . .' *Green* v. *United States*, 355 U. S. 184, 187 . . ." *Abbate* v. *United States*, 359 U. S. 187, 199 (opinion of Brennan, *J.*).

We are mindful of the vital public interests in fixing responsibility for breach of our laws and in punishing those guilty of such breaches. But those interests of State were undoubtedly as cogent when the double jeopardy provision was written into our Bill of Rights. They did not then and should ~~they~~ not now justify abuse or disregard of the guarantee.

The court below directs us to no special circumstances or overriding considerations of policy which would justify curtailment of the constitutional right in this case. It is noteworthy that the considerations advanced in support of the decision below, such as they are, are quite irrelevant. We grant that a trial judge has "responsibility and discretion to discontinue a particular trial when justice so requires", that he "bears an affirmative responsibility for the conduct of a criminal trial", that this "responsibility is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial", that he must "retain control of his courtroom" and must act "to protect the interests of the litigants or to preserve proper respect for federal law administration" (R. 26-27). These observations are incontrovertible. But (to borrow Mr. Justice Frankfurter's characterization in another context) they denude our problem of "illuminating concreteness" (*Monroe* v. *Pape*, — U. S. —, No. 39, this Term, Feb. 20, 1961 [Frankfurter, *J.*, dissenting]). None of them is pertinent here.

The court below agrees that there was no justification for discontinuance of the first trial in this case. There is in

this record no suggestion of "prejudice arising from nuances in the heated atmosphere of the trial." No one threatened the judge's complete "control of his courtroom". No party suggested the need for discontinuance. No disrespect was shown the court or the processes of justice.

In short, the considerations articulated in support of the decision below are not pertinent to this case. Moreover, even were they germane, we must be mindful that there is also a vital public interest that the constitutional rights of the citizen not be eroded. As Judge Waterman says, "the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights" (R. 33). See *United States* v. *Andolschek*, 142 F. 2nd 503, 506 (2nd Cir.). Even on occasions when the defendant or his counsel is at fault, courts have been reluctant to subordinate constitutional rights to the public interest. See *United States* v. *Whitlow*, 110 F. Supp. 871 (D. D. C.).[5]

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[5] This Court has approved retrial of a defendant before a second jury after an earlier mistrial where the first jury has been unable to agree upon a verdict (*United States* v. *Perez, supra; Keerl* v. *Montana*, 213 U. S. 135; *Logan* v. *United States*, 144 U. S. 263, 298; *Dreyer* v. *Illinois*, 187 U. S. 71); where an urgent military situation has made continuance of the first trial physically impossible (*Wade* v. *Hunter, supra*); and where the objectivity of the first jury has been impaired (*Simmons* v. *United States*, 142 U. S. 148; *Thompson* v. *United States*, 155 U. S. 271).

The draft of the statute on double jeopardy recommended by the American Law Institute may be of interest. It reads, in pertinent part, as follows:

> "Section 1.09. *When Prosecution Barred by Former Prosecution for the Same Offense.*
>
> When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former

The concluding paragraph of the prevailing opinion below itself betrays considerable reservation by the court as to the propriety of its ruling. We are assured that petitioner "was in no way harmed by the brief trial . . ." (R. 27). Literally, that may be true. But if the court suggests that petitioner has not been injured by termination of the first trial and retrial, the facts are otherwise. As a consequence of a second trial to a second jury, petitioner stands convicted and sentenced to imprisonment for a period of three and one-half years (R. 18). So far as anyone can tell, had the case been permitted to go to the first jury, discharged without petitioner's consent, petitioner might

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prosecution, it is barred by such former prosecution under the following circumstances:

* * * * *

(4) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(a) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.

(b) The trial court, in the exercise of its discretion, finds that the termination is necessary because:

(1) it is physically impossible to proceed with a trial in conformity with law; or

(2) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(3) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the State; or

(4) the jury is unable to agree upon a verdict; or

(5) false statements of a juror on voire dire prevent a fair trial." (ALI, Model Penal Code, Tentative Draft No. 5 (1956), pp. 44-45)

well have been acquitted. Thus, to tell petitioner that the first trial, being brief, was harmless affords him little solace for the deprivation of his constitutional right to be tried only once for the offense charged.

Nor is it any answer to note, as the court below does (R. 24, 28), that on the retrial petitioner was convicted. That is quite irrelevant to the issue whether it was proper to have tried him twice. When it emphasizes petitioner's conviction and repeatedly characterizes his plea of former jeopardy as one for "absolution for his crime" (R. 24, 28), we deferentially suggest the court doth protest too much. It seems to display a somewhat inordinate concern lest an accused in a criminal case go unpunished and a somewhat less than sufficient concern that he be assured his rights under the Constitution. What the court appears to suggest is that rulings on pleas of former jeopardy be postponed to abide the event of second trials. Submit the defendant to retrial. If he be convicted, he must be guilty; the plea is rejected. If he be acquitted, that is an end to the matter; the plea becomes moot and need not be determined at all. The procedure is tempting in its simplicity and foolproof certainty. Unfortunately, however, it thwarts the very purpose of the plea: to protect the accused from the jeopardy of a second trial.

The early opinion of Mr. Justice Livingston in *People* v. *Barrett*, 1 Johns. 66, 72, 74-75 (N. Y. 1806), subsequently cited with approval by this Court in *United States* v. *Ball*, 163 U. S. 662, 667, seems much more consonant with the spirit and letter of the Fifth Amendment:

> "... a power to try *ad infinitum*, as often as some latent defect be discovered in an indictment, may

not only be abused in the hands of an attorney general, but is unsafe in those of a court. If judges have the power of putting a party on his defence a second, and a third time, because of imperfections of this kind, there is no man who may not, if the court please, be finally convicted, or cruelly harrassed by such a course of proceeding. It is a sufficient argument against the assumption of such power, that it is subversive of the trial by jury, and that it is liable, in seasons of political conflicts, to great abuse. Judges are but men, and not more secure than others against improper influence."

II.

In any event, misconduct by a prosecutor cannot constitutionally justify declaration of a mistrial and retrial of the defendant for the same offense unless first he has consented to the mistrial. Since petitioner here did not consent, his retrial violated the double jeopardy provision of the Fifth Amendment.

We have demonstrated that the judgment below must be reversed because the record utterly fails to disclose that "manifest necessity" which, according to *Perez, supra,* alone justifies retrial of a defendant in the Federal courts after earlier termination of a first trial before verdict. We have shown further that, in vesting a trial judge with absolute power to declare a mistrial and to subject a defendant to retrial, the decision violates the rule in *Perez* and the constitutional interdiction of double jeopardy. There is a further reason why the decision below cannot stand: that, in any event, absent the defendant's consent, a prosecutor's misconduct cannot justify a mistrial and retrial of an accused in the Federal courts.

Although the majority below absolves the prosecutor in this case from any charge of misconduct (R. 23), we shall assume, for purposes of this argument, that he was guilty of misbehavior and that the trial judge acted to protect petitioner from the resulting prejudice. Even on that assumption, termination of the first trial without petitioner's consent and his retrial violated the constitutional provision as to double jeopardy.

Judge Waterman succinctly states the argument, as follows (R. 31):

> "Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the or case where the trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. *United States* v. *Ball*, 163 U. S. 662, 669-670 (1896). As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a 'nolle prosequi' during the trial without the bar of former jeopardy attaching. See *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Cornero* v. *United States*, 48 F. 2d 69, 71 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587, 595 (W. D. Mo. 1890); *app. dism'd*, 189 U. S. 789; *United States* v. *Shoemaker*, 27 Fed. Cases No. 16,279 (D. Ill. 1840); and cf. Frankfurter, J., concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 428-29 (1953). Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed."

The vice of permitting a district judge to terminate a trial for the defendant's protection because of the prosecutor's misconduct and thereafter to subject the defendant to a second trial for the same offense is two-fold: (1) it permits, if indeed it does not encourage, an ineffective prosecutor or one whose case appears weak to provoke the declaration of mistrial and thus to secure the advantage of a fresh start; and (2) it deprives an accused of that effective assistance of counsel which the Sixth Amendment guarantees him.

The prosecutor is victim to the foibles of all men. Unfortunately, he is too often more intent on securing a conviction than on assuring a fair trial. See, e.g., *Napue* v. *Illinois*, 360 U. S. 264, 269-270, and cases cited. If his case proves weak or the jury unsympathetic and he believes he can secure a mistrial and retrial whether or not the defendant's counsel consents, he will be prone to indulge in misbehavior to provoke a declaration of mistrial. Undoubtedly, it is that consideration which, as Judge Waterman points out (R. 31-32), has led courts to sanction retrials generally only where the factors inspiring them have not been within the control of the prosecution. "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Green* v. *United States*, 355 U. S. 184, 188. As Mr. Justice Frankfurter said, concurring, in *Brock* v. *North Carolina*, *supra*, 344 U. S. at 429:

> "A State falls short of its obligation when it . . . prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a

prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

Where the trial judge believes a mistrial necessary to protect the defendant against prejudice caused by misconduct of the prosecutor, it seems eminently sound to condition termination of the trial on the prior consent of the defendant. The interests of society in assuring a fair trial to the accused is thus amply satisfied. Notwithstanding apparent prejudice to the defendant's interest and the readiness of the court for that reason to terminate the trial, should the defendant choose to go ahead with the trial, he could not, in the event of conviction, urge a reversal on that ground. "A defendant cannot experiment on an acquittal, and then upon conviction take the position that . . . [the error] was so prejudicial as to entitle him to a new trial." *Etie* v. *United States*, 55 F. 2d 114, 115 (5th Cir.). See, also, *Claunch* v. *United States*, 155 F. 2d 261, 263 (5th Cir.); *Devine* v. *United States*, 278 F. 2d 552, 556 (9th Cir.). On the other hand, should defendant consent to the mistrial, he could not thereafter object to the second trial.

This rule of procedure avoids the serious constitutional question inevitably presented by declaration of a mistrial, as in this case, without the defendant's consent. If a trial judge be allowed to "protect" a defendant, notwithstanding his failure to ask such "protection", and to subject the defendant to the jeopardy of a second trial, the defendant is *pro tanto* deprived of that effective assistance of counsel guaranteed him by the Sixth Amendment. The Constitution assures an accused the assistance of counsel

of his own choosing, not the assistance of the court acting as counsel.

In the present case, the trial judge completely ignored petitioner. He did not deign even to consult petitioner or his counsel. Irritated by the *anticipation* of misconduct by the prosecutor, abruptly and in the presence of the jury, the court declared the mistrial without affording petitioner or his counsel an opportunity to speak. The dramatic suddenness of the mistrial declaration made it impossible for petitioner and his counsel even to confer.

It may be a trial judge's prerogative, as the court below says (R. 27), to "retain control of his courtroom." It is not his prerogative, as the court seemingly asserts, to control the conduct of the defendant's case. As Judge Waterman stated (R. 32-33), "the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice; his retrial should not be permitted."

The rule urged by Judge Waterman, which we endorse, is in all respects fair. It permits termination of a trial and the retrial of a defendant where, on the first trial, "an event occurred which prevented the completion of the jury's function" (*Crawford* v. *United States*, 285 F. 2d 661, 663 (D. C. Cir.)) or for compelling "circumstances of such nature that neither the court nor the attorney nor the parties have any control over them" (*State* v. *Whitman*, 93 Utah 557, 559, 74 P. 2d 696, 697). It prevents, however, a prosecuting attorney who believes a case is running against him from avoiding an acquittal by uni-

laterally provoking a mistrial; thus, it does not permit "a party to take advantage of his own wrong." *People* v. *Barrett, supra,* 1 Johns, 66, 72 (Livingston, *J.*, dissenting). It prevents a judge confronted with an inept or unprepared prosecutor from *sua sponte* holding the defendant over to a new trial where the case against him might be better prepared. It saves the defendant, whose resources may by that time be exhausted, the harassment, expense and jeopardy of a new trial. It fully honors the trial court's responsibility to assure a fair trial. It leaves the choice of exposure to the jeopardy of successive trials where the choice properly belongs, to the defendant and his counsel.

Government counsel have argued (Br. in Opposition, p. 5) that to forbid retrial after judicial *sua sponte* declaration of mistrial for prosecutor misconduct would be to "codify the rules of manifest necessity and double jeopardy into a rigid abstract formula", contrary to the admonition of this Court that a "rigid formula is inconsistent with the guiding principles of the *Perez* decision." *Wade* v. *Hunter, supra,* 336 U. S. at 691. That admonition, however, was, we are certain, not intended to forbid salutary rules, such as we urge here, designed to safeguard the constitutional guaranty against impairment. The principle Judge Waterman espouses is no more "rigid" than that fixed in *Perez*: that in the event of the inability of a jury to agree on a verdict, a trial may be terminated and the defendant subjected to a retrial.

III.

Petitioner did not waive his rights under the double jeopardy provision of the Fifth Amendment.

If we correctly read the decision below, it is in part posited upon a finding that petitioner waived his constitutional right not to be subjected to double jeopardy. Judge Waterman, dissenting, reads it likewise, although he finds "the court's opinion unclear on this point" (R. 33). Government counsel, however, have unequivocally stated that the "question of waiver by consent does not play a part in this case" (Br. in Opposition, p. 7). If that is so, of course, the question need not be considered by this Court.

In any event, the record makes plain that petitioner did not waive any of his rights under the double jeopardy provision of the Constitution. In view of the haste of the trial judge's action, the fact that the mistrial declaration occurred in the presence of the jury, and the consequent futility of speaking to it, one cannot reasonably derive consent from petitioner's passive "acquiescence" (R. 24) in the trial court's abrupt ruling. As Judge Waterman says: "In the present case . . . the possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from . . . [petitioner's] failure to protest" (R. 34).

This Court has repeatedly admonished that there is a strong presumption against waiver of fundamental rights by an accused and that such rights must ever be jealously and vigilantly guarded by the courts. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Glasser* v. *United States*, 315 U. S. 60, 70; *Von Moltke* v. *Gillies*, 332 U. S. 708, 723. Mind-

ful of that rule, it would be most inappropriate to construe a waiver in this case. As the Ninth Circuit Court said, in *Himmelfarb* v. *United States*, 175 F. 2nd 924, 931:

> "The mere silence of an accused or his failure to object or to protest a discharge of the jury cannot amount to a waiver of this immunity. 'It would be a harsh rule to hold that defendant consented to a withdrawal of the case from the jury simply because he interposed no objection.' State v. Richardson, 47 S. C. 166, 25 S. E. 220, 222, 35 L. R. A. 238."

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and a judgment of acquittal directed in this case. The decision of the Court of Appeals violates the well established principles of *Perez*. It radically impairs, if indeed it does not annul, the constitutional guarantee against double jeopardy. The caveat announced a century and a half ago by Mr. Justice Livingston when, as here, the rule against double jeopardy was under attack, is particularly pertinent: "It will be much better that the guilty now and then escape, in this way, than to introduce, or sanction, a practice which may place the innocent entirely in the power of a court, or a public prosecutor, which this mode of trial was intended to guard against" (*People* v. *Barrett*, 2 Caines (N. Y.) 304, 309 (1805)).

Respectfully submitted,

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Attorneys for Petitioner

March, 1961.

IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner

—v.—

UNITED STATES OF AMERICA.

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION *AMICUS CURIAE*

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Interest of the New York Civil Liberties Union

The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union, appears as *amicus curiae* with the written consent of both parties. The Union, a non-profit, non-partisan membership corporation is organized to encourage and foster the rights guaranteed by the Constitution and endeavors to vindicate those rights whenever threatened.

The Union appears here because of its conviction that petitioner has been "subject for the same offense to be twice put in jeopardy" within the meaning of the Fifth Amendment. This issue has been decided adversely to him in the courts below.

Facts

The facts are not in dispute and are adequately summarized both in the opinion of the Court of Appeals and petitioner's brief. It must be emphasized, however, that during the course of petitioner's trial, the court on its own motion declared a mistrial. The Trial Court stated that the mistrial was declared because of the conduct of the prosecuting attorney, apparently in the examination of a witness. Petitioner was retried and convicted.

Question Presented

Whether the declaration of a mistrial by a Federal Court in a criminal case on its own motion without the consent of defendant, because of alleged misconduct on the part of the prosecutor, gives rise to a plea of former jeopardy under the Fifth Amendment upon retrial?

Argument

The constitutional prohibition against double jeopardy is absolute on its face. It applies not only where there has been a prior conviction or acquittal, but also where a prior proceeding has been terminated before verdict without the defendant's consent. *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Wade* v. *Hunter*, 336 U. S. 684, 688 (1948); *Kepner* v. *United States*, 195 U. S. 100, 128 (1903); *Cornero* v. *United States*, 48 F. (2d) 69, (9th Cir. 1931).

Clearly then, a second trial for the same offense even where the first trial does not result in a verdict, is as constitutionally abhorent as multiple punishment or retrial for

the same offense after acquittal. The plain and salutary policy is to save the defendant from vexatious harassment of multiple trials whether the first trial terminated because of the prosecutor's plea of *nolle prosequi* (*United States* v. *Farring*, 25 Fed. Cas. 1042, 4 Cranch C.C. 465 (C.C.D.C., 1834)); or because of the absence of witnesses (*Cornero* v. *United States, supra*); or because of minor misconduct by defendant's own attorney (*United States* v. *Whitlaw*, 110 F. Supp. 871 (D.C.D.C., 1953)); or simply because of the court's inclination "to allow a prosecutor who has been incompetent or casual or even ineffective, to see if he cannot do better a second time" (Frankfurter, J. concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 429 (1952)).

However, in *United States* v. *Perez*, 9 Wheat. 579 (1824) this court at an early date carved out an exception to the rule. There, after the failure of the jury to agree on a verdict, the court discharged the jury without the consent of the defense or prosecution. On retrial the defendant raised the plea of former jeopardy. Justice Story, a stalwart protector of the constitutional defense against successive trials for the same crime* in writing the opinion of this court, was confronted with a dilemma. This case presented a countervailing policy in favor of the orderly and expeditious administration of justice. The spectre of a jury hopelessly deadlocked, with the trial court hesitant to discharge it lest the guilty go free on a subsequent plea of former jeopardy, pressed for a construction of double jeopardy to mean that a jury in such a case could be discharged, without doing violence to the doctrine.

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* His strong abhorrence of successive trials is marked by his insistence in a later case that a new trial in a criminal case could not be granted to anyone, not even to a defendant, *United States* v. *Gilbert*, 25 Fed. Cas. 1287, C.C. Mass. 1834.

But the construction was couched in carefully phrased cautionary language. Discharge without jeopardy can only result from "manifest necessity" or "urgent circumstances" for "very plain and obvious causes". In *United States* v. *Gilbert, supra* 1295, Justice Story again alluded to the problem and used such phrases as "pressing necessity", a power to be exercised "with extreme caution".

Petitioner here has suffered the burdens of harassment of successive trials. To suggest, as did the court below, that the defendant was in no way harmed by the first brief trial, ignores the doctrine on which the constitutional protection rests,—that a person should not be tried twice for the same offense, irrespective of the length of the first trial. To suggest also that petitioner seeks absolution for a crime "proven quite completely" on the second trial, makes a mockery of the constitutional protection.

Since petitioner has stood twice in the dock for the same offense, the only issue is whether the orderly administration of justice or as stated in *Perez* "the ends of public justice" or indeed, in any other policy, can justify the esult.

The court below purportedly relied on *Perez*. An analysis of its opinion makes it clear that the Court of Appeals has in fact fashioned an entirely new theory, which creates considerable risks for defendants and fritters away the constitutional protection.

The trial court's avowed reason for declaring the mistrial, was the conduct of the prosecutor in the examination of the witness. The Court of Appeals reading the record, could find no evidence of misconduct. The appellate court

found "that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions." The court, moreover, could not even determine what the trial court thought were the acts of misconduct of the prosecutor. Nonetheless, the Court of Appeals reached the conclusion that the trial court was acting to protect the rights of the defendant. From the record an inference that the trial court acted through whim, intemperance or desire to permit the prosecutor to retry his case is equally permissible.

Under the erroneous theory propounded by the Court of Appeals it does not matter whether the record itself supports a finding that would warrant the trial court's fears of prejudice to the defendant. It is sufficient, held the Court of Appeals, that the trial court *believes* that defendant may be prejudiced. The purported justification for this extraordinary view is that the trial court must "retain control of his courtroom", even if he is "overzealous" in performing his affirmative duties.

If the Court of Appeals is correct, the mandate of *Perez* for "extreme caution" under "urgent circumstances" is forever dissipated. Pressing necessity as a justification for multiple harassment is now replaced by the trial court's right to command his court. The fingerhole in the dike created by *Perez* has become a yawning chasm.

Objective standards for testing the exercise of discretion is thus replaced by amorphous subjective reactions of the trial court. Such subjective responses of the trial court, impossible of ascertainment for purposes of review, should not and cannot be the countervailing public policy justifying an exception to the constitutional prohibition against repeated trials for the same offense.

We concur with petitioner that the determination here offends the rule in Perez. But we likewise agree with the dissent below that the *Perez* rule is analytically inadequate. The very fact that the majority below could find something in *Perez* to sustain its view, documents this conclusion.

The critical factor, we submit, is that the trial court acted here without the consent of the defendant and on its own motion. It not only took command of the proceedings, but at the same time relegated to a secondary role the right of the defendant and his counsel to make a meaningful choice.

But surely the decision lies more properly with the defendant. Only he can gauge the risks of prejudice in the present trial against the harassment of a subsequent proceeding. Only a motion by defendant's counsel with the concurrence of the court can insulate the determination from whim and caprice. If the defendant does not believe himself prejudiced the *sua sponte* determination of the trial court must not end the trial.

There may be circumstances where the trial court must act without the consent of the defendant and without fear that jeopardy will attach. The facts in *Perez* present such a situation and at the same time suggests a more adequate standard: *the trial court may declare a mistrial on its own motion without the consent of the defendant and without giving rise to a plea of former jeopardy only when events during the course of the trial prevent its expeditious conclusion.*

Such a rule will justify the result in *Perez* where the jury was unable to agree after a reasonable time. It will

explain those cases where a juror or either of the parties or the judge became incapacitated during the course of a trial.

In *Wade* v. *Hunter, supra,* 336 U. S. 684 (1948), petitioner, a soldier was tried before a general court-martial in Germany during hostilities. After the commencement of the trial it was continued to permit the prosecutor to secure the presence of unavailable witnesses. Thereafter, petitioner's unit advanced further into Germany. His commanding general withdrew the charges stating:

> "Due to the tactical situation, the distance to the residence of such witnesses has become so great that the case cannot be completed without a reasonable time." (at p. 687)

The case was then referred for trial to a unit stationed near the scene of the crime. This court held that the plea of double jeopardy was unavailing. Here again, the standard way proposed would sustain the result.

Conclusion

The petitioner has been subjected to the harassment of successive trials prohibited by the Fifth Amendment. The determination of his first trial, it is submitted, resulted from nothing more than the caprice of the trial court. The standard of extreme caution required by *Perez* was surely not met. The theory suggested by the Court of Appeals relating to the obligation of the trial court's affirmative duty to control his courtroom reduces the constitutional protection to a rule of procedure. The *Perez* rule, despite its requirement for extreme caution, is nonetheless too

vague a standard, as the present case illustrates. The only justification for a discharge of the jury by the court on its own motion without the defendant's consent, ought to be events which prevent the trial from coming to an expeditious conclusion. Judged by this rule, the petitioner should be discharged.

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FILE COPY

No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1960

DANTE EDWARD GORI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals affirming the judgment below is reported at 282 F. 2d 43 (R. 20–34). Its opinion denying a petition for rehearing is reported at 282 F. 2d 52 (R. 36–38). The district court's opinion (R. 15–17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1960 (R. 20–34), and a petition for rehearing was denied on August 18, 1960 (R. 36–38). Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including October 17, 1960. The petition was filed on October 15,

1960, and was granted on December 12, 1960. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner could be retried without violating the double jeopardy prohibitions of the Fifth Amendment after the first trial was terminated by an order for mistrial, which the trial court entered *sua sponte*, apparently because it believed that the prosecutor's examination of a witness would go into an area which it regarded as irrelevant and prejudicial.

CONSTITUTIONAL PROVISION

The Fifth Amendment provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

STATEMENT

Petitioner and Franklin O. Corbett were indicted in the United States District Court for the Eastern District of New York upon the charge that on February 11, 1958, they received and had possession of goods stolen in interstate commerce, knowing the goods to have been stolen (R. 1-2). Corbett pleaded guilty (R. 10), while petitioner pleaded not guilty.

1. *The prior trial.*—A jury was empanelled and petitioner's trial, with Judge Abruzzo presiding, began on February 4, 1959. The Government by its first three witnesses established that a truck on which merchandise (gloves) from an interstate shipment had been loaded had been stored in a garage on the evening of January 7, 1958, and was missing the next morning.

It was found abandoned a few days later with the merchandise missing (R. 11).

In his opening statement, Government counsel had said that FBI agents would testify that on the morning of February 11 petitioner and Corbett were seen removing cartons of gloves from the basement of Corbett's house (R. 3). Defense counsel admitted that petitioner was there, but said that petitioner was merely working for pay (R. 3). The Government called, as its fourth witness, an FBI agent who testified that he first saw petitioner on February 10, 1958, in petitioner's automobile (R. 13). When the prosecutor asked what type automobile petitioner had, the following ensued (R. 13):

> The COURT. Mr. Passalacqua [Government counsel], please do not get immaterial evidence in here. I admonish you not to.
>
> Did you have a talk with him, yes or no?
>
> Mr. PASSALACQUA. Your Honor, will please allow me——
>
> The COURT. No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.[1]

It was then shown that the agent had seen petitioner on February 11, and the following occurred (R. 14):

> Q. Where did you see him on February 11th——
>
> The COURT. If you ask one more question that alludes to suspicion, I will withdraw a

[1] There had been a prior mistrial on the motion of the defendant after associate defense counsel was observed talking with one of the jurprs (Pet. 21; 10, fn. 4).

juror and put this case over to January of next year.

Now, I want this crime proved, not nine others.

Mr. PASSALACQUA. I am not referring——

The COURT. That is exactly what you are going to lead this jury to believe.

These agents are helpless. They have got to——

Juror No. 1, step out.

I declare a mistrial and I don't care whether the action is dismissed or not.

I declare a mistrial because of the conduct of the district attorney.

Mr. PASSALACQUA. I am not——

The COURT. You heard me. I don't want any more district attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is alright with me. That's all.

2. *The plea of double jeopardy.*—On March 9, 1959, the petitioner moved to dismiss the information on the ground that another trial would constitute double jeopardy (R. 4–5). The motion was denied on March 26, 1959 (R. 15–17). The petitioner was retried in April, 1959, found guilty, and sentenced to imprisonment for three and one-half years (R. 18). On appeal, the only question raised was the claim of double jeopardy. The Court of Appeals for the Second Circuit, *en banc,* affirmed the trial court's ruling by a 4–1 vote (R. 20–34).

Both the majority and the dissent agreed that, in the words of the majority opinion, "the prosecutor

did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions" (R. 23, 32). Both agreed that, nevertheless, the trial judge, in ruling as he did, was, in the words of the majority, "acting according to his convictions in protecting the rights of the accused" (R. 24, 32). The disagreement was as to the effect of the trial judge's action. The majority were of the view that "for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future" (R. 28). The dissenting judge was of the view that "a district judge, acting *sua sponte*, does not have power to order a mistrial because of trial misconduct by the prosecuting attorney without giving rise to a sustainable plea of former jeopardy should retrial be attempted" (R. 33).

SUMMARY OF ARGUMENT

I

Consideration of the common law history and the development of double jeopardy concepts establishes that, where there has been no adjudication on the merits, a further trial is barred only when, under the particular circumstances, it represents oppressive practices on the part of the government.

The American concept of double jeopardy represents an amalgam of two distinct ideas having different origins and history. The primary content—and, in the view of some, the only content—of double

jeopardy is the old common law plea of *autrefois acquit* or *convict,* a plea which lay only where there had been a verdict of innocence or guilt.

The application of double jeopardy concepts to mistrials stems from a different source. In the earliest days the rule was said, at least by the text-writers, to be that a jury, once empanelled, could *never* be discharged before delivering a verdict—a rule based upon an almost mystical notion that the jury was irrevocably vested with the power and duty of decision, a power that could be taken from them neither for the benefit of the prosecution nor of the prisoner. In practice, however, it appears that juries were quite frequently discharged, and in the time of the Stuarts much abuse seems to have been practiced by discharging juries when it appeared the evidence was inadequate and retrying the defendant after additional evidence had been gathered. While the English judges, in reaction to those abuses, thereafter agreed among themselves severely to limit the granting of mistrials, it was finally settled—though not until the nineteenth century—that the power to discharge the jury did exist and that, while it ought to be cautiously exercised, a discharge, even if it ought not have been made, would not bar a subsequent trial.

In this country, although there was disagreement among the state courts, the question of the power of federal judges to discharge juries was definitively settled in 1824 in *United States* v. *Perez,* 9 Wheat. 579, holding that the trial courts have undoubted *power* to order a discharge; that it ought to be exercised sparingly and only when the "end of public jus-

tice" would otherwise be defeated; but that a discharge would not bar a retrial for whatever reason the discharge occurred. While the *Perez* case has been accepted ever since then as establishing a broad and flexible power to discharge juries and direct a retrial, the implication that the termination of a trial short of verdict could *never* bar a subsequent trial seems not to have been accepted. Rather, the courts have found in the double jeopardy clause not only the embodiment of the common law pleas of *autrefois acquit* and *autrefois convict* but also a purpose to protect against the oppressive practices to which the power to direct mistrials had been put in the time of the Stuarts—especially the discharge of juries to permit further evidence to be obtained by the prosecution. It is from that history, and not from sterile fictions that jeopardy "attaches" when the jury is sworn, that our law has drawn the application of the double jeopardy clause to mistrials, and the content of the prohibition in that application. The rule is simply that, even though the first trial was terminated before verdict and thus does not support a plea of *autrefois acquit* or *convict,* a subsequent trial will nevertheless be barred if, under all the circumstances of the particular case, it would work oppression or injustice to the defendant.

II

Since there has been no adjudication on the merits and the petitioner has not been subjected to any oppressive actions, it was proper to retry him. Petitioner is not being punished twice nor is he being oppressed by successive trials at the government's

insistence. The prosecution did not ask for the mistrial order, did not instigate it directly or indirectly, and indeed it opposed a mistrial. Nor can it be said that the court, as distinct from the prosecutor, was harassing the petitioner, for the court was seeking, mistakenly or not, to protect the best interests of the petitioner.

It has already been determined that, when possible prejudice to a defendant flows from a trial court's own error, a *sua sponte* mistrial will not bar further prosecution. Similarly, an error as to the necessity for a mistrial should not bar a proper adjudication on the merits. The trial court, in our system of law, exercises considerable discretion. If it should be held that mere error in directing a mistrial would bar a second trial, even though no oppressive motive or result is shown, it would, in effect, fetter the trial judge's discretion. A fair-minded judge would feel required to resolve any doubts in favor of the government since any other course might potentially release the defendant without an adjudication on the merits.

Petitioner's suggestion that a mistrial should be allowed only at the defendant's request would eliminate the trial court's right to control the proceedings, perpetuate an anomalous doctrine of "waiver," and produce inequality and confusion where there are several defendants who take differing positions. Whether entered *sua sponte* or on motion, a mistrial should be treated as a judgment of acquittal only in the situation where it is affirmatively shown that the retrial has an oppressive character.

The fact that the trial court ordered a mistrial for what he deemed to be improper conduct by the prosecutor does not, in itself, bar a future trial. In this case the prosecutor was exonerated of any misbehavior, but even in cases of actual misconduct the remedy should not ordinarily be to give the defendant the benefit of a judgment of acquittal. To accept such a mechanical rule would go contrary to the prior decisions of this Court. As we have said, the decision whether a retrial after a mistrial violates double jeopardy turns rather upon whether, under all the circumstances of the particular case, a retrial would have an oppressive effect. Since there was no oppression of petitioner, retrial in this case was proper.

ARGUMENT

Mr. Justice Cardozo, speaking for the Court in the case of *Palko* v. *Connecticut*, 302 U.S. 319, 323, warned that in problems of double jeopardy, "[t]he tyranny of labels * * * must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." The argument of petitioner is, we think, premised upon just such a use of labels.

Petitioner seeks to have set aside a conviction, the validity of which he does not question, because the judge at a prior trial acted overzealously in his behalf. The judge declared a mistrial because of some imagined impropriety of Government counsel which the judge deemed prejudicial to the defendant. There was no adjudication on the merits, and the trial judge did not purport to find the imagined misconduct so

serious as to justify a judgment of acquittal. Yet petitioner insists on the right which would flow from a valid judgment of acquittal—the right not to be tried again for the same offense. With the court below, we think such a result on these facts "would be an injustice to the public in the particular case and a disastrous precedent for the future" (R. 28). Trial judges already have great powers which, however arbitrarily exercised, are not normally subject to review on behalf of the prosecution. That power should not be further extended to cover a situation such as that presented here. We show that, in the circumstances of this case, retrial violates neither the words, the history, nor the spirit of the double jeopardy clause of the Fifth Amendment; that this Court is free to decide this case as the ends of public justice dictate; and that, when the various considerations are balanced, the judgment below should be affirmed.

I

WHERE THERE HAS BEEN NO ADJUDICATION OF THE MERITS, A RETRIAL IS BARRED ONLY WHEN IT REPRESENTS OPPRESSIVE ACTION

A. THE ENGLISH BACKGROUND

The starting point in determining the content of the double jeopardy clause of the Fifth Amendment is, of course, the early English common law that preceded its adoption. The main source of the double jeopardy clause, and its primary content, was the common law plea of *autrefois acquit* or *autrefois con-*

vict. Blackstone pointed out in his work that (4 Blackstone, *Commentaries*, 335–336):

> [T]he plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence * * *.[1]

Those pleas, however, have little bearing on the problem here for they did not lie unless a verdict of either innocence or guilt was delivered by the trier of fact. 2 Wharton, *Criminal Procedure* (10th ed.) Sec. 1426; 2 Hale, *Pleas of the Crown* (1847) 241–242; 2 Hawkins, *Pleas of the Crown* 527 (6th ed. 1787). See *Regina* v. *Winsor*, 10 Cox C.C. 276, 327, 329 (Q.B. 1865, Ex. Ch. 1866); *Regina* v. *Charlesworth*, 5 L.T. 150, 151 (Q.B. 1861).

The power to declare mistrials, involved here, has a very different background. It begins with the ancient notion that the jury, once empanelled, is irrevocably vested with the exclusive power—and, no less important, the unshakable duty—finally to dispose of the cause. As summarized by Lord Coke (3 Inst. 110):

> To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is

[1] A passage from Bracton shows an awareness of such a doctrine. He notes that an appellee who vanquishes the appellant in battle is absolved from further suits, even from "the suit of the king, because by this he purges his innocence against them all, as if he had put himself upon the country, and the country had altogether acquitted him." Bracton, *Laws and Customs of England*, 3d Book, c. 19, § 8. See also 2 Hawkins, *Pleas of the Crown*, 527 (6th ed. 1787).

> retorned, and sworn, their verdict must be heard, and they cannot be discharged * * *.

Nor was that merely a pious injunction. Not only could the jury not be discharged at the request either of the Crown or of the prisoner, or of both, but the possibility of the jurors failing to agree was forestalled, with evident efficiency, by not releasing them until they *did agree* (2 Coke upon Littleton, Book 3, Ch. 5, Sec. 366):

> By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him only if they be agreed.

The verdict, once entered, was in turn final and conclusive; neither a writ of error nor a new trial could be had even by the defendant.[3]

Those attributes of the jury system at early common law can be explained only as reflecting an almost mystical concept of the jury as an organ of truth endowed, perhaps divinely, with the final authority to adjudge the case—a concept which, however foreign to modern ears, no doubt seemed less strange to a society that had but recently found truth revealed by physical combat or by ordeal. Whatever the conceptual genesis of the rule, however, it seems evident

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[3] See opinion of Mr. Justice Story, on circuit, in *United States* v. *Gibert*, 2 Sumner 19, 25 Fed. Cas. 1287, 1294–1303 (No. 15204) (D. Mass. 1834); *Green* v. *United States*, 355 U.S. 184, 202–203 (Frankfurter, J. dissenting); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 4.

that its concern was not, as such, the protection of the prisoner in the individual case, for the coercion of the jury to reach a verdict and the denial of any remedy for error, either by mistrial or by appeal, seem harsh indeed by today's standards. Rather, the rule was essentially a "jurisdictional" one, concerned simply with the division of the power between the jury and the judges. The authority to decide the case was in the jury, and the judges had no more power to discharge the jury before verdict than they did to reverse its decision or order a new trial after verdict.

Notwithstanding the rigor of the rule as declared by Lord Coke, there seems no doubt that in actual practice juries were on occasion discharged before verdict. In the first place, of course, there must have been occasions in which events, such as the death or illness of a juror, made it impossible for a verdict to be reached.* In addition, however, Hale in his *Pleas of the Crown,* Vol. 2, p. 295, reports that it was common practice to discharge the jury and order a retrial if it appeared that some of the evidence was not then available. In the time of the Stuarts, indeed, the practice became subject to considerable abuse. An example of the vexatious practices of the day is *Whitebreak and Fenwick's Case,* 7 State Tri. 311, 315, where the Crown, seeing that its evidence was insufficient, moved for a mistrial in order to gather more evidence. Upon obtaining the evidence, the defendants were retried.

* See opinion of Cockburn, C. J., in *Regina* v. *Winsor,* 10 Cox C.C. 276, 310 (Q.B. 1865, Ex. Ch. 1866).

After the Revolution of 1688, the pendulum swung back and there seems to have been some agreement among the judges severely limiting the practice of discharging jurors before verdict.[5] Once again, however it was found impossible to adhere to a rigid rule. In the case of the two *Kinlochs*, Foster, *Crown Cases* 16 (1746), the question arose whether, on a trial for treason, a capital offense, the court had power, at the defendant's request, to discharge a jury so that the defendant could put in a defense that would otherwise have been unavailable to him. The issue was raised by a motion in arrest of judgment after the defendant had been retried and convicted. Foster reports that all ten judges, except one, agreed that the conviction at the second trial should be upheld and that they agreed "that admitting the rule laid down by Lord Coke to be a good general rule, yet it cannot be universally binding: nor is it easy to lay down any rule that will be so" (p. 27). All of them agreed, however, in condemning the practice of discharging a jury to permit the Crown to obtain further evidence as had been done in the case of *Whitebread and Fenwick* under the Stuarts.

When the notion that the original jury was somehow irrevocably invested with the sole authority to decide the case lost its force, it was to be expected that the juries would also be relieved of the coercive

[5] The agreement was reported as being that there would be no withdrawal of a jury without consent in felony cases and none, even with consent, in capital cases, but the accuracy of this report was questioned by Foster in his summary of the case of the two *Kinlochs*, discussed in the text. See Foster, *Crown Cases*, *supra*, pp. 27–28.

forces designed to compel them to come to agreement. It was not, however, until after the American revolution, in the middle of the nineteenth century, that the English courts held definitively that the trial judge had power to discharge a jury when the jurors reported that they could not reach agreement. *Regina* v. *Charlesworth*, 5 L.T. 150 (Q.B. 1861); *Regina* v. *Winsor*, 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).[6]

It should be emphasized that the English development of the power to discharge juries was in terms, not of a privilege personal to the defendant, but of jurisdictional concepts of the powers vested in juries, which might operate equally in favor of or against the defendant. That was reflected, indeed, in the procedural mode by which the question was raised. Unlike the pleas *autrefois acquit* or *autrefois convict*, which were in the nature of pleas in bar, the objection that a jury had been previously sworn and discharged was raised by a motion in arrest of judgment and challenged the *jurisdiction* of the second tribunal.[7] It was, for example, because the matter was so viewed—rather than as being a privilege of the defendant that he might raise to bar the second trial—that the issue was considered so doubtful in

[6] A contrary ruling was reached in *Conway and Lynch* v. *Regina*, 7 Irish Law Rep. 149, but the dissenting opinion of Justice Crampton in that case was adopted in the cases cited above.

[7] See, *e.g.*, *Regina* v. *Charlesworth*, *supra*; *Regina* v. *Winsor*, *supra*. The issue was raised by a plea in bar before the second trial in *Conway and Lynch* v. *Regina*, 7 Irish Law Rep. 149, and the Crown did not object. The judges decided the issue, but expressed doubts as to whether the procedure was correct.

the *Kinlochs* case notwithstanding that the discharge of the original jury had been at the defendant's request and for his benefit. While the defendant could have waived his "privilege", if such it had been, to be tried by the original jury, he could not confer upon a second jury a power that the law had given exclusively to the first, and hence it was necessary to resolve the question as one of the "power" of the judge to have discharged the first jury and convened another.

The consequence of viewing the problem essentially as one of the impotence of the judge to take from the original jury its power of decision and give it to another was that, once that conceptual difficulty was overcome, there remained nothing to prevent a second trial whatever the reason for the discharge of the first jury may have been. While a distinction between a discharge for the benefit of the defendant and one made for other reasons would be relevant if the question were one of the defendant's privileges, it is not relevant if the question is solely one of the capacity *vel non* to take the the case away from the jury first sworn to hear it. Accordingly, once the English courts held that the power given the first jury was not irrevocable, it followed that there was no bar to a second trial whether or not the power to discharge the first jury had been erroneously or improperly exercised, and the courts so held. See opinion of Erle, C. J. for the Exchequer Chamber in *Regina* v. *Winsor, supra,* 10 Cox C.C. at 329; *Rex* v. *Lewis,* 78 L.J. K.B. (N.S.) 722 (1909); *Regina* v. *Davison,* 2 F. and F. 250, 254 (1860). Indeed, in *Rex* v. *Lewis,* the Court of Criminal Appeal ex-

pressly disapproved of the ground for which a mistrial had been declared (because prosecution witnesses were absent) but nevertheless upheld the retrial and ultimate conviction of the defendant.

B. THE EARLY STATE DECISIONS

Since the question of the power to discharge juries at all, even in the case of disagreement, was unsettled in England at the time of American independence, it is not surprising that the issue should have arisen here in the early days of the republic. Like the English cases, the early American cases tended to view the question simply as one of power in a jurisdictional sense—*i.e.*, whether the court ever had the power to discharge one jury and empanel another, even in the case of disagreement. Several state courts, following Lord Coke and Blackstone,[8] denied the power unless the first trial had been aborted by physical events beyond the control of the court. *E.g., State* v. *Garrigues,* 2 N.C. 276 (1795); *Commonwealth* v. *Cook,* 6 Serg. & R. 577 (Pa. 1822). Others upheld the power. *Commonwealth* v. *Bowden,* 9 Mass. 494 (1813); *People* v. *Olcott,* 2 John. 301 (N.Y. 1801); see 2 Wharton, *Criminal Procedure* (10th ed.), Sec. 1427–1443. The most notable of the latter decisions is the opinion of Judge Kent in *People* v. *Olcott,* which, in its criticism of Lord Coke and Blackstone

[8] However, unlike Lord Coke's statement (quoted *supra*) that the jury should never be discharged, Blackstone acknowledged an exception "in cases of evident necessity", stating that, after evidence has been presented, "the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict". 4 Blackstone, *Commentaries* 360.

and in its ultimate conclusion upholding the power, foreshadowed to a remarkable degree the subsequent opinions of the English judges in *Regina* v. *Winsor, supra,* 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).

Almost from the outset, however, the question—although historically one of the division of powers between judge and jury rather than of the defendant's privileges (and often, indeed, working to the defendant's disadvantage)—began to take on constitutional overtones, with the double jeopardy clauses of the state constitutions being interpreted as going beyond the pleas of *autrefois acquit* or *convict* and including protection, at least in some circumstances, against a second trial even though the first had aborted before a verdict. See, *e.g., Commonwealth* v. *Cook,* 6 Serg. & R. 577 (Pa. 1822); *People* v. *Goodwin,* 18 John. 187 (N.Y. 1820). Wharton in his work on *Criminal Procedure* (10th ed.), Sec. 1427, states:

> In this country the constitutional provision has, in some instances, been construed to mean more than the common law maxim, and in several of the states it has been held that where a jury in a capital case has been discharged without consent before verdict, after having been sworn and charged with the offense, the defendant, under certain limitations, may bar a second prosecution by a special plea setting forth the fact that his life has already been put in jeopardy for the same offense. But between the pleas of autrefois acquit or convict, and once in jeopardy, there is this important distinction, that the former presupposes a verdict, the latter, the discharge of the jury

> without verdict, and is in the nature of a plea puis darrein continuance: * * *

Even so, however, none of the state courts interpreted the double jeopardy clauses as an absolute bar against retrial after a mistrial. Even those states which took the strictest view of the power to discharge a jury came in time to recognize that there were at least some circumstances, such as the failure of a jury to agree, in which the jury might be discharged without the consent of the defendant and the defendant be retried without violating double jeopardy. *E.g., Hilands* v. *Commonwealth,* 111 Pa. 1 (1885); *State* v. *Honeycutt,* 74 N.C. 391 (1876). On the other hand, however, even the states which took the broadest view of the power of the trial court to discharge a jury in its discretion recognized that the particular grounds for the exercise of the power might be such that a retrial would be oppressive and violate the double jeopardy provision. Thus in New York, a few years after the opinion in *People* v. *Olcott, supra,* had upheld the power to order a mistrial, the court nevertheless ordered the release of a defendant after a discharge of a jury when it was discovered that the discharge had been made in order to enable the prosecution to obtain further evidence. *People* v. *Barrett,* 2 Caines 100, 305.

In summary, although there were gradations among the states in their willingness to allow mistrials and subsequent retrials[9]—in part the product, we think, of a confusion between double jeopardy and the

[9] The many state cases are summarized by states in 2 Wharton, *Criminal Procedure* (10th ed.), Secs. 1427–1457.

ancient, and often repressive, concepts of the nearly absolute powers of juries—the plea of a previous but uncompleted trial, unlike the pleas of *autrefois acquit* or *convict,* was never deemed an absolute bar to a second trial. Instead, the courts examined the record of the prior proceedings in each case to determine whether under the particular circumstances a retrial would be oppressive or offend their concepts of double jeopardy.

C. THE FEDERAL DECISIONS

In the federal courts, the basic question of the power to discharge a jury and direct a retrial was laid to rest by the decision of this Court in 1824 in *United States* v. *Perez,* 9 Wheat. 579. The jury in a capital case, being unable to agree, was discharged without the consent of the defendant, who thereupon moved for his release from custody on the ground that the discharge of the jury was a bar to any future trial. This Court, in an opinion by Mr. Justice Story, held that he could be retried (pp. 579–580):

> We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the end of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circum-

> stances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.

The *Perez* opinion seems clearly to have adopted what later became the English view that, while as a matter of practice the power to order a discharge ought to be sparingly exercised, even an erroneous discharge would not operate to bar a second trial, for so long as the defendant "has not been convicted or acquitted," he "may again be put upon his defence." The necessary implication was that the double jeopardy clause was limited to the common law pleas in bar—*autrefois acquit* or *convict*—and that there was no prior jeopardy within the meaning of the Constitution so long as the prior trial was aborted before verdict. That implication is confirmed by the opinion of Mr. Justice Washington, who participated in the *Perez* decision, just a few months earlier in *United States* v. *Haskell*, 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15321), where, sitting on circuit, he had expressly held that the double jeopardy clause of the Fifth Amendment was limited to prior convic-

tions or acquittals and was inapplicable to mistrials.[10] Story himself, in the first edition of his *Commentaries on the Constitution* (1833), published only nine years after his opinion in *Perez,* confirmed that view of the Fifth Amendment (Sec. 1787):

> * * * The meaning of it is, that a party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged by the verdict of a jury * * *. But it does not mean that he shall not be tried for the offence a second time if the jury shall have been discharged without giving a verdict; * * * for in such case his life or limb cannot judicially be said to have been put in jeopardy.

Mr. Justice Story again expressed the same view the following year while sitting on circuit, saying of the decision in *Perez* that "the court did not go into any exposition of the clause of the Constitution * * * but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted and *therefore* might again be put upon his defence." *United States* v. *Gilbert,* 2 Sumner 19, 56, 25 Fed. Cases 1287 (No. 15204) (D. Mass. 1834) (emphasis added).

[10] *Id.* at 212: "We are in short of opinion, that the moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction."

The question of the *effect* of a discharge of the jury in barring a subsequent trial is, of course, as Mr. Justice Story recognized, very different from the question of the *propriety* of discharging the jury. On the latter question, the *Perez* case, recognizing that it was "impossible to define all the circumstances which would render it proper" to discharge the jury, established for the federal courts a flexible standard authorizing the discharge of the jury, not only in cases of "manifest necessity", but whenever in the trial court's opinion "the end of public justice would otherwise be defeated"—in short, whenever justice so requires. By the reference to "public justice", moreover, the Court recognized that the interests of the state in a fair opportunity to present its case, as well as the interests of the defendant, were properly to be taken into account in deciding whether to discharge the jury.[11]

Both, then, on the propriety of discharging the jury and on the power to retry the defendant, the Court, in its earliest opinion, seems to have taken the broadest possible view, holding in substance that the trial courts had discretionary power to discharge juries whenever in their opinion the ends of justice required; that the power "ought" to be exercised with caution; but that the only "security" for its sound exercise lay with the trial courts themselves,

[11] Mr. Justice Story's concern that the state, as well as the defendant, be given a fair opportunity to present its case is confirmed by his later decision, on circuit, in *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cases 622 (No. 14858), granting a government motion for a mistrial when an essential witness unexpectedly refused to be sworn.

for even an improper discharge would not bar a second trial.

2. The broad standards of *Perez* governing the propriety of the discharge of a jury have been repeatedly endorsed by this Court in a series of decisions finding discharges for a variety of reasons to have been a proper exercise of discretion. *Simmons* v. *United States*, 142 U.S. 148 (publication of controverted reports of a juror's acquaintance with defendant); *Logan* v. *United States*, 144 U.S. 263, 297–298 (failure to agree); *Thompson* v. *United States*, 155 U.S. 271 (discovery of disqualification of juror who had served on grand jury); *Lovato* v. *New Mexico*, 242 U.S. 199 (technical discharge and reswearing of jury in erroneous belief that defendant had not yet pleaded); *Wade* v. *Hunter*, 336 U.S. 684 (court-martial dismissed when military advance of unit made it impracticable to obtain additional witnesses desired to be heard by court-martial).

The implication of *Perez* that the double jeopardy clause applies exclusively to cases of former acquittal or conviction has not, however, fared so well. While that meaning of the opinion was recognized—and, indeed, sought to be supported by an exhaustive analysis of the historical background—by the Supreme Court of the District of Columbia in *United States* v. *Bigelow*, 14 D.C. 393 (1884), other federal courts found in the double jeopardy clause protection also against the historical abuses of the power to grant mistrials—namely, to enable the prosecution to obtain further evidence when it appeared the jury might not convict (see pp. 13–14, *supra*). Thus, the prosecutor

was denied at an early date the right to enter a *nolle prosequi* after the trial had begun, and his action in doing so was deemed to have the effect of an acquittal and to bar a reindictment. *United States* v. *Shoemaker*, 2 McLean 114, 27 Fed. Cases 1067 (No. 16279). It was similarly held that a mistrial declared by the court because of the absence of prosecution witnesses operated as an acquittal and barred a second trial. *United States* v. *Watson*, 3 Ben. 1, 28 Fed. Cases 499 (No. 16651); *Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9).

In the early decisions of this Court following the *Perez* case, it was unnecessary for the Court to consider what the effect would be of an improper discharge of the jury since in each case the Court found that the discharge had been proper. *Simmons* v. *United States*, 142 U.S. 148; *Logan* v. *United States*, 144 U.S. 263; *Thompson* v. *United States*, 155 U.S. 271.[12] Yet the very fact that the Court considered the reasons for the discharges conveys some implication that a second trial might be barred as double jeopardy, depending upon the reasons for the discharge. And the most recent decisions of the Court have made explicit that in some circumstances the double jeopardy clause would apply to mistrials. See *Wade* v. *Hunter*, 336 U.S. 684, 688; *Green* v. *United States*, 355 U.S. 184, 188.

[12] *Lovato* v. *New Mexico*, 242 U.S. 199, might perhaps be viewed as involving a discharge that was "erroneous" in the sense that there was in fact no need to have the defendant plead again, but the Court viewed the action taken, though perhaps "over-cautious" and the product of "confusion," as being "within the bounds of sound judicial discretion" (p. 201).

D. THE CONCLUSIONS TO BE DRAWN FROM THE HISTORICAL DEVELOPMENT

What the historical development of the power to discharge juries and of the effect of such a discharge in barring a subsequent trial shows, we think, is that the problem is not one that can be resolved by rigid theoretical concepts. The ancient common law notion that there was a total lack of power to discharge the jury has of course long been abandoned, and it has never been the rule in this country (if, indeed, it ever was in England) that the discharge of a jury *per se* bars a second trial. Yet the absolute at the other extreme—implied by *Perez* and the view later adopted in England—that a second trial after a mistrial is *never* barred, whatever the reasons for the mistrial, has equally been rejected. Since any theoretical or mechanical rule of when "jeopardy" attaches—*e.g.*, when the jury is sworn or evidence is introduced or not until a verdict is given—would seem necessarily to require one extreme or the other, it seems evident that the command of the Fifth Amendment in its application to mistrials cannot be expressed in rigid or absolute terms.

The meaning that has been given to the double jeopardy clause can best be explained, we think, by recognizing that the clause is not monolithic but embodies a variety of prohibitions. Its first, and historically most unquestionable, meaning is to give constitutional status to the common law pleas of *autrefois acquit* and *autrefois convict*, and in that meaning, no doubt, it is a rigid and absolute command. In its application to mistrials, however, the historical ante-

cedent is quite different—namely, the abuse of the power to discharge juries in the time of the Stuarts to permit the Crown, when its evidence seemed insufficient, to have a second opportunity to try the defendant. It was from the history of those abuses, and the reaction of the colonies against them, that the application of the double jeopardy clause to mistrials as well as to acquittals or convictions has been inferred. See *Brock* v. *North Carolina*, 344 U.S. 424, 440–442 (Mr. Justice Douglas, dissenting). And it is from that history that the basis for distinguishing among mistrials springs—namely, whether under all the circumstances a second trial would subject the defendant to oppression or harassment. In short, however technical and absolute the Fifth Amendment may be in the prohibition of a second trial after acquittal or conviction, its qualified prohibition of mistrials is of a very different order and expresses, not a technical rule, but a basic requirement of fairness and a broad protection against oppression not readily confined within a verbal formula.

That view of the Fifth Amendment provides a ready explanation of the distinctions that have been made in permitting a second trial after a jury has been discharged. To permit the prosecution, after the trial has begun, to enter a *nolle prosequi* at will, or to allow mistrials for the sole purpose of enabling the prosecution to gather more evidence—in the absence at least of intervening or unanticipated events depriving the state of a fair opportunity to present its case—would be to sanction the very kind of oppressive practices against which the prohibition was

aimed. On the other hand, the mistrials which have been held not to bar a second prosecution have been those which involved no element of harassment and were, to the contrary, necessary to afford both parties a fair opportunity to present their case. In contrast, the fiction that "jeopardy" attaches when the jury is sworn but yet unaccountably does not bar a second "jeopardy" in certain "exceptions" to the "general" rule explains nothing; it only states the result—and states it, moreover, in a potentially misleading form.

This Court adopted the pragmatic, non-conceptual approach to the effect of mistrials in its most recent decisions. In *Wade* v. *Hunter,* 336 U.S. 684, a wartime court-martial, after having heard the evidence offered, reopened the hearing on its own motion and requested that the testimony of additional witnesses be presented. The case was continued until the witnesses would be available, but before they could be heard the Army Division which had convened the court had advanced, in its military campaign against the enemy, so far from the place of the crime that the Commanding General concluded that it was no longer practicable to procure the witnesses. He accordingly dismissed the court and referred the charges to another unit, nearer the place of the crime, for trial. In holding that the conviction at the second trial did not violate double jeopardy, this Court emphatically rejected any attempt to define double jeopardy by a "rigid" or "abstract formula." Although acknowledging that the double jeopardy clause may be applicable even though the first trial is termi-

nated without a verdict, the Court, in an opinion by Mr. Justice Black, noted that the Fifth Amendment (pp. 688–689):

> * * * does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

The guiding rule for determining when "justice requires that a particular trial be discontinued", the Court said, was that announced in the *Perez* case and followed by the Court ever since—a rule which "attempts to lay down no rigid formula" but permits a mistrial whenever a "failure to discontinue would defeat the ends of justice" (pp. 689, 690). The Court went on expressly to reject a standard requiring an "imperious" or "urgent necessity" for a mistrial or even a rule that the absence of witnesses can never justify a discontinuance, saying (p. 691):

> * * * Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract for-

> mula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

Applying that "broad test" to the case before it, the Court concluded that "petitioner's second court-martial trial was not the kind of double jeopardy within the intent of the Fifth Amendment" (p. 690).

The "type of oppressive practices at which the double-jeopardy prohibition is aimed" (*Wade* v. *Hunter,* at pp. 688–689), and by which its content is to be defined, was spelled out at greater length, in a somewhat different context, in *Green* v. *United States,* 355 U.S. 184, 187–188:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Referring specifically to the applicability of the double-jeopardy clause when a trial is terminated before verdict, the Court gave as the reason for that application that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict" (355 U.S. at 188).

In summary, this Court has consistently avoided any attempt to capture the meaning of the double-jeopardy clause, as applied to mistrials, in a rigid conceptual framework or a verbal formula. In terms of the standards by which the trial courts are to be governed in declaring mistrials, the Court "has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be served". *Brock* v. *North Carolina,* 344 U.S. 424, 427. And in determining whether a retrial is barred once a jury has been discharged, the Court has looked to all the circumstances of the particular case to determine whether the retrial violated the underlying "intent" of the Fifth Amendment—whether, in short, the retrial represented "the type of oppressive practices at which the double-jeopardy prohibition is aimed" (*Wade* v. *Hunter,* 336 U.S. 684, 688–689, 690). It is by that broad, non-technical standard that this case must be judged and not, as petitioner would have it, by erecting a non-existent absolute and asking whether this case fits within a rigidly defined, and neatly pigeonholed, "exception."

II

SINCE THERE HAS BEEN NO ADJUDICATION ON THE MERITS AND NO OPPRESSIVE ACTION AGAINST THE PETITIONER, IT WAS PROPER TO RETRY HIM.

A. THERE WAS NO OPPRESSIVE ACTION AGAINST PETITIONER

As we have shown, it has been settled law in the federal courts, ever since *United States* v. *Perez,* 9 Wheat. 579, that the double jeopardy clause of the

Constitution does not prohibit a second trial as such when the first trial has been terminated before verdict. Only when the second trial represents a governmental effort to harass or oppress a defendant by successive trials is there a violation of the protection against double jeopardy.

The instant case does not fall within the rationale of the double-jeopardy protection. The petitioner is not being exposed to a vexatious string of prosecutions designed eventually to convict him. The petitioner can show only that his earlier trial was terminated during its first day and that, three months later, he was brought to trial and convicted. He was in no way harmed by the earlier trial since the case was terminated before he put in any defense. To the contrary, as the court of appeals below noted, the prior trial "revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him" (R. 27). See also *Killilea* v. *United States*, February 23, 1961, C.A. 1, petition for a writ of certiorari pending, No. 929 Misc., this Term.

In no sense can it be said that the prosecution was trying to harass the petitioner. The prosecution did not seek, directly or indirectly, to cause a mistrial. Petitioner himself admits that the prosecutor was doing nothing wrong, and, indeed, it is difficult to understand what troubled the judge. Since the opening statements revealed that the contested issue in the case would be that of petitioner's knowledge, the

prosecutor could not confine his evidence to the moment when petitioner was found in possession of the stolen goods, but had to show facts from which knowledge could be inferred. If the prosecutor was pursuing an improper line of questioning, it certainly was not with a premeditation designed to terminate the trial prematurely. He was amply prepared to see this fairly simple case come to its ultimate conclusion, and he opposed a mistrial. As the court of appeals pointed out, the prosecutor "did nothing to instigate the declaration of a mistrial" and "he was only performing his assigned duty under trying conditions" (R. 23).

Nor can it be said that the court, as distinct from the prosecutor, was harassing the petitioner. It is evident that, mistakenly or not, the court was acting in the interests of petitioner. And, while the mistrial was ordered *sua sponte,* it should be noted that defense counsel not only acquiesced in the order but to some extent encouraged it. Defense counsel encouraged the court in the belief that the prosecutor was asking improper questions by lodging technical objections (R. 14, 23). Petitioner ought not now be heard to say that the questions to which he objected on trial were completely proper (even if they were), for the mistrial order must be viewed "in the heated atmosphere" of the trial as it was then unfolding; it "cannot be fully depicted in the cold record on appeal" (R. 26–27). See also *United States* v. *Harriman,* 130 F. Supp. 198, 204 (S.D. N.Y.); *Wade* v. *Hunter,* 336 U.S. at 691.

B. SINCE THERE WAS NO OPPRESSIVE ACTION AGAINST PETITIONER, HE SHOULD NOT HAVE THE BENEFIT OF AN ACQUITTAL

The case thus comes down to the simple question whether the fact that the trial court, in an error of judgment, acted overzealously in behalf of petitioner entitled the petitioner to the benefit of a judgment of acquittal, even though there was no basis for an acquittal and the trial judge did not even purport to award the defendant an acquittal." We think that such a result would go back several hundred years in history to the mystique that there is something sacred about having a jury which has started to hear a case carry it through to the end. The modern vitality of the double jeopardy clause is to protect a defendant from harassment, direct or indirect. Since there was here no harassment of petitioner, that should be the end of the matter.

Any other conclusion would have serious implications for the course of justice. "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States*, 273 U.S. 95, 99. The double jeopardy rule, like all the other constitutional protections, "being designed to promote the ends of justice [should] not be used utterly to subvert and defeat it; being intended as a fence against disorder,

[12] Since the trial judge did not purport to grant an acquittal, this case does not present the problem involved in *Fong Foo et al.* v. *United States*, petition for certiorari pending, Nos. 788 and 789, this Term, as to whether an improper judgment of acquittal can be corrected by mandamus.

[it should] not be turned into a snare." *United States* v. *Morris,* 26 Fed. Cas. 1323, 1327 (No. 15815). Judges, prosecutors, and defense counsel are human beings who make human errors. It would hardly further the cause of justice to hold that mere error by any of them, *ipso facto,* entitles a defendant to escape without trial.

The courts have not so ruled. The courts have already held that, when possible prejudice to a defendant flows from a trial court's error, a *sua sponte* mistrial will not prevent further prosecution in the same matter. See *Scott* v. *United States,* 202 F. 2d 354 (C.A. D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles,* 19 F. Supp. 1009 (W.D. Okla). See also *Lovato* v. *New Mexico,* 242 U.S. 199, 201. In the *Scott* case, *supra,* the court withdrew an order allowing attorneys for three of the four defendants to have associate counsel and declared a mistrial *sua sponte* as to all four defendants when the three claimed prejudice although they would not move for a mistrial. The court of appeals ruled that all four defendants could be retried although the fourth defendant had no part in the proceedings which gave rise to the mistrial. In *Giles,* the trial court in the presence of the jury made remarks prejudicial to the government which were given wide newspaper publicity. The following day, over the objections of the defendant, a mistrial was ordered because the trial court was of the opinion that its statements had made a fair trial for either party impossible. It was held that such a mistrial does not constitute a bar to a second trial, for if the judge acted impartially

"as we must assume [it] did, [its] action was not only justified but required." *United States* v. *Giles,* at 1011. In short, an error by a court which gives cause for a mistrial does not bar retrial.

Similarly, an error by the court as to the necessity for a mistrial for some other reason should not bar a proper adjudication on the merits. In our system, the trial judge necessarily has considerable discretion in the conduct of a trial, and in the determination of whether a mistrial should be granted. If it should be held that mere error in his conclusion as to the necessity for a mistrial, where no oppressive motive or result is shown, nevertheless bars further trial, the results could well be detrimental to even-handed justice. A conscientious and fair-minded trial judge would feel required to resolve any doubts in favor of the government since an error against the defendant would be correctible on appeal with a new trial to follow, whereas an error against the government would result in an acquittal in fact. On the other hand, a capricious judge could grant a defendant the benefits of a judgment of acquittal without purporting to do so and without having the possibility of his action questioned.[14]

All sorts of situations have given rise to mistrials—action by jurors (*Simmons* v. *United States,* 142 U.S. 148; *United States* v. *Cimino,* 224 F. 2d 274 (C.A. 2)); actions by outsiders, such as newspaper publicity (*Simmons v. United States, supra*); actions by prosecutors (*Blair* v. *White,* 24 F. 2d 323 (C.A. 8)); action

[14] The First Circuit has held that a judgment of acquittal entered without power to do so is correctible by mandamus. See *Fong Foo, et al.* v. *United States,* petition for a writ of certiorari pending, Nos. 788 and 789, this Term.

by defense counsel (*United States v. Whitlow*, 110 F. Supp. 871 (D.D.C.)). In each of the varied circumstances, the judge must make a rapid decision whether justice will be better served by a new trial. It should not be held that an error in that determination forever frees a defendant from meeting the charges against him. Judges should be allowed to "lean over backwards" in favor of a defendant without fearing that, in so doing, they will give him an unintended judgment of acquittal.

United States v. *McCunn*, 36 F. 2d 52 (S.D.N.Y.), is illustrative of this principle. There, the court discovered that the defendant's brother was married to an aunt of one of the jurors. The defendant and the juror were unacquainted and both were ignorant of the distant relationship. The court found that it was impossible to determine whether the relationship would tend to influence the jury either favorably or adversely towards the defendant. Nevertheless, even though no positive proof of prejudice existed, it was deemed to be a proper exercise of the court's discretion to discharge the jury and order a new trial because of the possibility of prejudice. The result ought not to be different even if the court on the second trial concluded that the trial court had no basis for finding a possibility of prejudice.

Petitioner suggests that the way to resolve this problem is to permit a mistrial only if defense counsel asks for it. But any ruling that the power to declare a mistrial must await a motion to such effect would effectively eliminate the judge's right to control the conduct of the proceedings. See *Glasser* v. *United*

States, 315 U.S. 60, 71. If the judge is aware that his order for mistrial might possibly discharge the defendant from any prosecution whatsoever merely because on appeal the mistrial is deemed not to have been founded on a sufficient degree of prejudice, he undoubtedly will refrain from exercising his discretion.[15] He will wait for defense counsel to move for a mistrial so that the talismanic formula of "waiver" will validate the defendant's exposure to a second trial. *Blair* v. *White*, 24 F. 2d 323 (C.A. 8); *United States* v. *Harriman*, 130 F. Supp. 198, 204 (S.D. N.Y.). That would take the discretion of whether or not a mistrial should be ordered out of the trial court's hands, where it belongs, and put it into the defense counsel's. Defense counsel will often find it advantageous to play the waiting game. He may well decide to wait for a verdict, hoping that, if it is a verdict of guilty, it may be set aside for error on appeal. See *Scott* v. *United States*, 202 F. 2d 354, discussed, *supra*, p. 35. And the result would be hopeless confusion and inequality where there are two defendants, one of whom moves for a mistrial and the other does not. See *Killilea* v. *United States*, February 23, 1961, C.A. 1, petition for a writ of certiorari pending, No. 929 Misc., this Term.

[15] *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C.) illustrates the dangers which flow from a rigid approach. There, counsel for the *defendant* overstepped the bounds of propriety in the examination of witnesses. The trial court *sua sponte* ordered a mistrial. Defendant thereafter moved to dismiss the indictment on grounds of double jeopardy. His motion was granted on the grounds that defense counsel's admitted prejudicial conduct was not outrageous enough to war-

The trial court not only has discretion, but has a duty to call a mistrial in the interests of justice. Whenever it appears "that a free and fair trial cannot be had it ought to be stopped, even over objection of the accused, and the Constitution will not prevent another and better trial." *Sanford* v. *Robbins*, 115 F. 2d 435, 439 (C.A. 5), certiorari denied, 312 U.S. 697. This Court has consistently held that there may be a new trial after a mistrial granted without the consent, and even over the objection, of a defendant. *United States* v. *Perez*, 9 Wheat. 579; *Simmons* v. *United States*, 142 U.S. 148, 154; *Wade* v. *Hunter*, 336 U.S. 684, 689. As the court of appeals below noted (R. 27):

> Even though there may be a rare case where in retrospect the judge may seem to have been overzealous in his protection of the rights of an accused, we think the law is better served by the preservation of the responsibility which the federal precedents impose upon him.

Finally, the waiver doctrine is itself founded on dubious premises. If it were held, in a case where events prejudicial to the defendant have prevented a fair trial, that a *sua sponte* mistrial would bar a second trial but one on motion of the defendant would

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rant a mistrial. Such a position has two distinct disadvantages. Clearly it will, in effect, tend to eliminate the trial court's discretion in these matters. It also encourages defense counsel to adopt a method of conduct which may lead the trial court to grant an improper mistrial and thereby relieve the defendant of any further prosecution without ever coming to a determination of his guilt or innocence. The case stands alone in its holding and is criticized at 67 Harv. L. Rev. 346 (1953) for its inflexibility.

not, the result would be to force the defendant to choose either to accept an unfair trial or "consent" to a second trial—*i.e.*, to sacrifice his purported constitutional right not to be tried again as the price of preserving his admitted constitutional right to a fair trial. The analogous waiver doctrine once offered to rationalize—it does not explain—allowing a retrial after a defendant procures a reversal of a conviction was exposed by Mr. Justice Holmes, dissenting in *Kepner* v. *United States*, 195 U.S. 100, 135, and has been substantially abandoned today (see *Green* v. *United States*, 355 U.S. 184, 191–192). It ought not be resurrected here. If the mistrial is induced for purposes of oppression or harassment—*e.g.*, if it were deliberately provoked by a prosecutor in order to obtain more evidence—it ought to bar a retrial even if the defendant were forced to move for the termination of the trial to protect himself against prejudicial tactics. If the mistrial is not oppressive, then it ought make no difference whether it was declared on motion of the court or on motion of the defendant.

C. THE FACT THAT THE TRIAL JUDGE GRANTED A MISTRIAL FOR WHAT HE BELIEVED TO BE IMPROPER CONDUCT BY THE PROSECUTOR DOES NOT BAR A FURTHER TRIAL

Petitioner argues that, since the trial judge based his declaration of a mistrial on what he deemed to be misconduct of the prosecution, the validity of the subsequent trial must be tested on that basis. He then argues that misconduct of the prosecutor can never justify a mistrial and a retrial without the consent of the defendant. Such a rule, we think, would substitute a mechanical rule by label for a rule designed

to effectuate justice. Petitioner attempts to do what this Court in *Wade* v. *Hunter*, 336 U.S. 684, 691, said should not be done: use "the mechanical application of an abstract formula," rather than taking "all circumstances into account."

Even a genuine error by a prosecutor which the trial judge properly believes to warrant a mistrial should not normally result in giving a defendant the benefit of a judgment of acquittal. As noted, *supra*, errors by a judge have been ruled not to require such a result. *Scott* v. *United States*, 202 F. 2d 354 (C.A.D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles*, 19 F. Supp. 1009 (W.D. Okla.). An error by the prosecutor ought not to be subject to a more rigorous standard. When, on appeal, this Court has found that the prosecution was guilty of misconduct, it has not directed an acquittal but has remanded the case for a new trial. *Berger* v. *United States*, 295 U.S. 78, 88–89. It would not be conducive to prompt and speedy trials to hold that an error by the prosecution is correctible by the district court without motion by the defendant, only at the risk of having defendant escape trial completely. The result will surely be in most cases that the district court will allow the case to proceed unless a defendant "waives" double jeopardy by a motion for mistrial or by appeal. Yet this Court has indicated that district courts should stop misconduct without waiting for a motion. *Viereck* v. *United States*, 318 U.S. 236, 248. District courts should also be able to do justice by granting a mistrial if they think that is warranted, without waiting for a motion. As we have shown,

whether retrial after mistrial violates double jeopardy depends upon whether in the particular circumstances retrial has an oppressive effect. That leaves the courts ample authority to protect the defendant from the various possibilities that may be adumbrated to suggest that a prosecutor would deliberately provoke a mistrial when a case was going badly. The prevention of such possibilities does not require a rule that a mere mistake by a prosecutor frees a defendant.

Still less does it require a rule that the judge's erroneous estimation of misconduct has the effect of barring a second trial. As we pointed out in our historical review, the American courts have never gone as far as the English in accepting the judge's declaration of a mistrial as conclusively permitting retrial. The courts have always been willing to reexamine the facts to determine whether the declaration for mistrial was oppressive in character, as where a mistrial was granted because the government was not prepared. The rule should also work in reverse. Even if it should be held that actual misconduct by the prosecution which causes a mistrial bars further trial, the judge's estimation of misconduct ought not to be conclusive to the extent of giving the defendant the benefit of an acquittal without reexamination particularly since, by granting a mistrial, the judge does not even purport to acquit.

This Court early, in *United States* v. *Perez*, 9 Wheat. 579, and recently, in *Wade* v. *Hunter*, 336 U.S. 684, has recognized that the "ends of public

justice" must be considered in determining whether there shall be a retrial after declaration of a mistrial. The constitutional provision for trial by jury does not concern the defendant alone. Article 3, Section 2, Clause 3, states in terms that the trial "shall be" by jury, thereby creating a right in the people generally and in their government to have criminal prosecutions tried. The Government's consent is therefore required to waive a jury trial. See *Patton* v. *United States*, 281 U.S. 276, 312; Rule 23(a), F.R. Crim. P.[16] Similarly, this Court in *Ex parte United States*, 287 U.S. 241, 249, upheld the "absolute right" of the Government, as the representative of the public, "to put the accused on trial"; and in *United States* v. *Thompson*, 251 U.S. 407, 415, the court overruled an "assertion of the judicial discretion * * * incompatible with * * * the right of the Government to initiate prosecutions for crime * * *."

Thus, while the defendant is entitled to be protected against harassment and unfair tactics, the Government too, and the public interest it represents in enforcing the criminal laws, is entitled to a fair opportunity to present its case and obtain an adjudication on the merits. To hold that seemingly capricious

[16] The framers of the Federal Rules of Criminal Procedure, although urged to delete from their preliminary drafts the requirement of what is now Rule 23(a) for consent of the Government to waiver of a jury, deliberately refused to do so. See the comments on Rule 21(a) (the present 23(a)) in the comments by members of the bar, circulated to all members of the Advisory Committee (Vols. I and II, mimeographed (1943)). See also Stewart, *Comments on Federal Rules of Criminal Procedure*, 8 John Marshall L. Q. 296, 301 (1943).

action of a trial judge, causing no prejudice to the defendant (and, indeed, motivated in his behalf), operates to bar the people's case and absolve the defendant from prosecution without an adjudication of his guilt or innocence would, as the court of appeals concluded, "be an injustice to the public in the particular case and a disastrous precedent for the future."

In sum, in determining whether retrial after mistrial involves a violation of double jeopardy, the courts must take "all circumstances into account." *Wade* v. *Hunter,* 336 U.S. at p. 691. On the facts here, retrial was in no sense oppressive to the petitioner. There was thus no reason why he should not be retried after the trial judge declared a mistrial for his benefit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APRIL 1961.

U.S. GOVERNMENT PRINTING OFFICE 1961

IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner,

-v-

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

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CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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CITATIONS

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UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

1. The Government concedes that the record in this case discloses no necessity whatever for the trial judge's declaration of mistrial. This concession is decisive for a reversal of the judgment of conviction below.

The Government characterizes the trial court's action variously as "an error by the court as to the necessity for a mistrial" (Gov't. Br. 36), as "mere error" (*Id.* 8), as based upon "imagined impropriety of Government counsel" (*Id.* 9), and as "seemingly capricious" (*Id.* 43). The Government makes no effort to establish that the action of the trial court in any way served the purposes of justice or any public interest whatever. In short, the Government concedes that there was no necessity at all for the action of the trial court.

United States v. *Perez*, 9 Wheat. 579, the touchstone of all decisions on this question, makes it clear that, unless

there was "a manifest necessity for the . . . [declaration of mistrial] or the ends of public justice would otherwise be defeated," the defendant cannot be retried, and that the power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." Since here, unquestionably, there was no necessity at all for the action of the trial judge, petitioner's plea of double jeopardy must be sustained.

2. The Government argues, however, that, even in a case, such as this one, in which there is no necessity for the declaration of a mistrial—even if the judge's action in declaring a mistrial be arbitrary and capricious—the bar of double jeopardy does not attach unless the defendant affirmatively demonstrates that the mistrial declaration resulted from some malevolent motive of the prosecutor or of the trial judge to oppress him or would result in some extraordinary prejudice to him.

The Government would require a defendant to establish that "under all the circumstances a second trial would subject the defendant to oppression or harassment" (Gov't. Br. 27) or that "the second trial represents a governmental effort to harass or oppress a defendant by successive trials" (*Id.* 32).

We know of no case supporting such a rule, and the Government cites none. In all cases of which we are aware, the reviewing courts have addressed themselves to the issue whether the declaration of mistrial was a sound exercise of judicial discretion predicated upon necessity manifested in the record. In no case has a court, finding no necessity of record for mistrial, sanctioned a retrial of the defendant

because he failed to sustain the burden which the Government would here place on petitioner.

The courts have uniformly held that jeopardy attaches either when the jury is impaneled or evidence introduced. At such point, a constitutional right to have the trial go forward to conclusion vests in the defendant. That right, in appropriate circumstances, has been subordinated to the interests of justice. However, when, as in the present case, the declaration of mistrial admittedly has served no interest of justice, the Constitution commands that the defendant not be tried again.

Not only is the rule for which the Government contends, so far as we know, unsupported by any of the decided cases; it would be impossible to apply. The constitutional protection against double jeopardy is designed in part to assure "that an accused shall not have to marshal the resources and energies necessary for his defense more than once . . . [and] '. . . that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity . . .'" *Abbate* v. *United States*, 359 U. S. 187, 199 (opinion of Brennan, J.). Is then a trial judge considering the declaration of a mistrial or a reviewing court to inquire as to the particular defendant's financial resources, his capacity to withstand the emotional stresses of successive trials, his ability to produce witnesses at a later date, the availability of counsel at a later date, and as to like matters touching upon the burden which would result to him from retrial? Are constitutional rights to turn upon such quantitative in-

quiries? And, since the answer to such inquiries must differ from individual to individual, does not such a rule raise serious questions as to equal protection of the laws?

Insofar as the rule looks to the motives of the prosecutor or the trial judge, in seeking or ordering a new trial, is proof of such motives to be adduced? If not, are subsequent courts reviewing the declaration of mistrial to speculate whether the prosecutor or the judge acted merely erroneously or was motivated by malevolent intent to harass and oppress the defendant?

Moreover, why should the application of the constitutional protection against double jeopardy turn on the motives of the prosecutor or the judge? We know of no instance in Anglo-American law in which an appellate court is required to consider not only the correctness of a trial judge's action but his motives in taking such action as well.

It is clear therefore that, when there is no necessity for the declaration of a mistrial, the constitutional prohibition against exposing the defendant to double jeopardy precludes a second trial. Whatever may be the countervailing considerations of public justice which, in a particular case, might justify a second trial, no such considerations are present in this case, and the judgment of conviction must be reversed.

3. Reading *Perez* in a manner which it admits has not "fared so well" in this Court and in other federal courts (Gov't. Br. 24), the Government, by a rationale not entirely clear, apparently argues that *Perez* supports retrial after a declaration of mistrial even where there is no nec-

essity for the mistrial. The Government reads *Perez* as holding "that the termination of a trial short of verdict . . . never bar[s] a subsequent trial" (Gov't Br. 7). The rule of *Perez*, says the Government, is that the action of a trial court in declaring a mistrial is in no circumstance reviewable, that "even an erroneous discharge [of a jury before verdict] would not operate to bar a second trial" (Gov't. Br. 21). In short, *Perez*, as the Government construes it, reads mistrial situations out of the double jeopardy clause of the Fifth Amendment.

As we shall presently demonstrate, *Perez* stands for no such doctrine. Whether or not it does, however, the fact is that the Government does not urge such a rule here. As we have indicated, the Government recognizes that this rule, if ever *Perez* announced it, is no longer viable.

The Government concedes that there are circumstances in which a declaration of mistrial precludes a second trial.*

Once the Government abandons its radical construction of *Perez* and recognizes, as it does, that mistrial declarations are reviewable, what remains pertinent in *Perez* are the criteria that decision enunciates for the sound exercise of discretion by the trial judge. It is difficult then to see how *Perez* in any sense supports the rule for which the Government contends. For, there is no need to engage in any conjecture as to the criteria laid down by *Perez*. The

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* Indeed, the Government goes so far as to support the prohibition of retrials in some situations even where the defendant himself moves for the mistrial: ". . . If the mistrial is induced for purposes of oppression or harassment—*e.g.*, if it were deliberately provoked by a prosecutor in order to obtain more evidence—it ought to bar a retrial even if the defendant were forced to move for the termination of the trial to protect himself against prejudicial tactics . . ." (Gov't. Br. 40).

opinion is perfectly explicit: mistrials may be declared only in cases of "manifest necessity" or where "the ends of public justice would otherwise be defeated" and only "with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . ." (9 Wheat. at 580). It is equally plain that these criteria have not here been satisfied.

In any event, in our view, the Government's reading of *Perez* is incorrect. In *Perez*, the Court dealt with two types of situations arising under the double jeopardy clause. In cases where the accused has been convicted or acquitted, there is no question that a retrial for the same offense is barred. In cases, however, where the "prisoner has not been convicted or acquitted", but where the trial has been terminated by a mistrial, he may be retried only if the mistrial, "taking all the circumstances into consideration", has been predicated upon the grounds set forth in the Court's opinion.

In attempting to support its reading of *Perez*, the Government relies upon *United States* v. *Haskell*, 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15321), decided prior to *Perez* on circuit by Mr. Justice Washington, one of the justices participating in the *Perez* decision, and on *United States* v. *Gibert*, 25 Fed. Cases 1287 (No. 15204), decided by Mr. Justice Story on circuit some ten years after *Perez*.

Neither of these cases, however, supports the Government's reading of *Perez*. *United States* v. *Haskell*, *supra*, involved a purely procedural question as to how a claim of an impermissible retrial might be raised. Although Mr. Justice Washington was apparently of the view that the double jeopardy clause of the Fifth Amendment was not

applicable to mistrial situations, what is of crucial significance here is that he expressly indicated that an improper declaration of mistrial might, notwithstanding, preclude a second trial, stating: "We do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal, since he may have all the benefit of the error, if committed, by a motion for his discharge, or upon a motion in arrest of judgment". Mr. Justice Washington merely held that objection to a retrial after earlier declaration of a mistrial could not be raised by a plea in bar.

Gibert held that a defendant could not move for a new trial after a conviction. Neither the decision nor the opinion, however, indicates that Mr. Justice Story believed that the double jeopardy clause of the Constitution does not embrace declarations of mistrial as well as instances of acquittal or conviction. After reviewing the state precedents embodying certain divergencies of view with respect to the application of the double jeopardy clause, Mr. Justice Story directed himself specifically to those precedents which held that the double jeopardy clause does apply to declarations of mistrial and stated: "It was (as I think) among other things, to get rid of the terrible precedents on this subject alluded to by Lord Hale . . . in discharging juries from giving verdicts upon frivolous or oppressive suggestions, that this great maxim of the common law was ingrafted into the Constitution." Justice Story thus made it clear that retrial after unjustified declaration of mistrial is prohibited by the double jeopardy clause and that indeed the correction of such abuses was one of the chief purposes for the adoption of the double jeopardy clause.

4. In addition to the major contentions of the Government, discussed above, certain additional arguments are suggested by the Government's brief.

(a) In light of the Government's unequivocal statement, in opposing certiorari, that "the question of waiver by consent does not play a part in this case" (Brief in opposition, p. 7), we are frankly surprised that it now urges that "defense counsel not only acquiesced in the order [of mistrial] but, to some extent, encouraged it" (Gov't. Br. 33). If the Government is now contending that petitioner consented to the mistrial and has thereby waived his constitutional rights, we submit that there is no basis at all in the record for such contention. For, there was no opportunity whatever to object to the wholly unexpected and vehement declaration of mistrial. On this point, we respectfully refer the Court to our main brief at pages 28-29.

Moreover, the argument that, by objecting to certain of the questions asked by Government counsel, defense counsel "encouraged" a declaration of mistrial is wholly untenable. The distinction between objecting to questions and moving for a mistrial is apparent and requires no further elaboration. Is a defense counsel to be inhibited from interposing objections to questions lest such objections later be treated as veiled motions for a mistrial? "Encouragement", if any there was, is certainly not the legal equivalent of a waiver of the constitutional objection to a second trial. It is also significant and somewhat curious to note that the Government construes the prosecutor's silence as evidencing objection whereas it construes defense counsel's silence as evidencing consent (Gov't. Br. 33).

(b) In attempting to refute the doctrine of Judge Waterman's dissent, that a declaration of mistrial declared without the consent of the accused and predicated upon prosecution misconduct should bar a second trial, the Government makes certain procedural arguments concerning the effect of such a rule.

The Government first contends that, if a mistrial on this ground cannot be declared without the consent of defense counsel, "'counsel will often find it advantageous to play the waiting game" (Gov't. Br. 38). It is clear, however, that such a "waiting game" cannot be played. If error is made, counsel can, of course, object to such error, and curative instructions can be given by the trial judge. If, however, counsel is of the opinion that such instructions are not sufficient to cure the error, he must move for a mistrial or else be barred from contending on appeal that such error was not cured by the instructions and that a mistrial should have *sua sponte* been declared. *Devine* v. *United States*, 278 F. 2d 552 (C.A. 9); *Claunch* v. *United States*, 155 F. 2d 261 (C.A. 5); *Etie* v. *United States*, 55 F. 2d 114 (C.A. 5).

The Government further argues that in the case of multiple defendants such a rule would be unworkable. However, a judge confronted with the situation in which only some defendants consent to a mistrial can, of course, sever and obviate this difficulty.

The Government's contention that the rule for which we contend is inflexible and therefore contrary to the spirit of *Perez* is likewise untenable. Flexible rules often have particular well-defined applications. The case of jury dis-

agreement is a similar instance of crystallization in this area.

It is well settled that a prosecutor who feels that he will be unable to convict cannot *nolle pros* a case in order that a subsequent attempt to convict the accused can be made. We submit that Judge Waterman's view that a prosecutor should not be permitted to do indirectly what he cannot do directly should be adopted. Prosecution misconduct should never be the basis for subjecting the defendant to a second trial without his consent.

(c) The Government states that "[p]etitioner seeks to have set aside a conviction, the validity of which he does not question . . ." (Gov't. Br. 9). Needless to say, petitioner does challenge his conviction on the most fundamental of grounds—*i.e.*, that such conviction violates the United States Constitution. The Government's argument, given any force, would effectively nullify the double jeopardy provision in all cases. The purpose of the double jeopardy clause is to protect the defendant from the harassment of successive trials, and whether a second trial would result in an acquittal or a conviction is wholly irrelevant, for the policy can only have meaning if such a second trial is prohibited.

There are, of course, many instances in which countervailing policy considerations designed to protect individual liberty from governmental intrusion result in restraints upon prosecutions for crime. Statutes of limitation are obvious examples. In order to protect the defendant from being subjected to a trial which, by the passage of time, he is ill-equipped to defend, the state is prevented by such

statutes from bringing a prosecution no matter how strong may be the evidence at its command establishing the defendant's guilt. Exclusionary rules of evidence, such as the privilege against self-incrimination and the rule excluding coerced confessions, likewise, to some extent, inhibit prosecutions in order to protect the individual from oppressive governmental action. See *Rogers* v. *Richmond*, — U. S. —, No. 40, O.T. 1960.

The Government's argument that petitioner's subsequent conviction has any bearing on the question of whether he has been deprived of his constitutional freedom from double jeopardy is therefore wholly untenable and runs counter to the numerous decisions of this Court which recognize that the interest of the state in prosecuting crimes cannot be the basis for depriving the individual of his constitutional protections against governmental oppression.

CONCLUSION

Even if the decisions of this Court concerning permissible retrial after the declaration of a mistrial are to be read as holding that the interests of the accused in being protected from a second trial are to be balanced against the interests of public justice in having the first trial terminated and the defendant subjected to a second trial, the judgment below cannot stand. There is divergence between the Government's view and ours with respect to this balancing process. We submit, however, that since in the present case there unquestionably was no necessity at all for the declaration of mistrial and since no public interest has here been shown to balance against petitioner's valued constitutional rights,

the judgment below must be reversed and acquittal of petitioner directed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 486.—October Term, 1960.

Dante Edward Goff, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In view of this Court's prior decisions, our limited grant of certiorari in this case [1] brings a narrow question here. We are to determine whether, in the particular circumstances of this record, petitioner's conviction at his second trial [2] for violation of 18 U. S. C. § 659,[3] after his first trial had been terminated by the trial judge's declaration of a mistrial *sua sponte* and without petitioner's "active and express consent," [4] violates the Fifth Amendment's prohibition of double jeopardy. The Court of Appeals for the Second Circuit *in banc* affirmed petitioner's conviction (one judge dissenting), holding his constitutional objection without merit. 282 F. 2d 43. We agree that the Fifth Amendment does not require a contrary result.[5]

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[1] 364 U. S. 917.

[2] Prior to the proceedings in the two trials which are relevant for present purposes, denominated the "first" and "second" trials herein, there had been a mistrial granted upon motion of petitioner.

[3] The statute makes unlawful, *inter alia*, the receipt or possession of any goods stolen from a vehicle and moving as, or constituting, an interstate shipment of freight, knowing the good to be stolen.

[4] 282 F. 2d 43, 46.

[5] We cannot, of course, determine what result would obtain had the Court of Appeals, in light of its close acquaintance with the local situation, decided that petitioner's mistrial operated to bar his further prosecution, and were such a decision before us.

Petitioner was brought to trial before a jury in the District Court for the Eastern District of New York on February 4, 1959, on an information charging that he had knowingly received and possessed goods stolen in interstate commerce. That same afternoon, during the direct examination of the fourth witness for the Government, the presiding judge, on his own motion and with neither approval nor objection by petitioner's counsel,[6] withdrew a juror and declared a mistrial. It is unclear what reasons caused the court to take this action, which the Court of Appeals characterized as "overassiduous" and criticized as premature.[7] Apparently the trial judge inferred that the prosecuting attorney's line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused, and took action to forestall it. In any event, it is obvious, as the Court of Appeals concluded, that the judge "was acting according to his convictions in protecting the rights of the accused." 282 F. 2d, at 46. The court below did not hold the mistrial ruling erroneous or an abuse of discretion. It did find the prosecutor's conduct unexceptionable and the reason for the mistrial, therefore, not "entirely clear."

[6] In light of our disposition, we need not reach the Government's suggestion that petitioner's failure to object to the mistrial adversely affects his claim. We note petitioner's argument that, because of the precipitous course of events, there was no opportunity for such objection.

[7] "The colloquy [immediately preceding the mistrial] . . . demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions. This is borne out by the entire transcript, including also that covering the morning session. Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. . . ." 282 F. 2d, at 46.

It did say that "the judge should have awaited a definite question which would have permitted a clear-cut ruling," and that, in failing to do so, he displayed an "overzealousness" and acted "too hastily." *Id.*, at 46, 48. But after discussing the wide range of discretion which the "fundamental concepts of the federal administration of criminal justice" allow to the trial judge in determining whether or not a mistrial is appropriate—a responsibility which "is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal," *id.*, at 47—and the corresponding affirmative responsibility for the conduct of a criminal trial which the federal precedents impose, it concluded:

> "On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. . . ." *Id.*, at 48.

Certainly, on the skimpy record before us[*] it would exceed the appropriate scope of review were we ourselves to attempt to pass an independent judgment upon the propriety of the mistrial, even should we be prone to do so—as we are not, with due regard for the guiding familiarity with district judges and with district court conditions possessed by the Courts of Appeals.

On March 9, 1959, petitioner moved to dismiss the information on the ground that to try him again would

[*] The record here contains, with respect to the February 4 trial, two paragraphs from the Government's opening, four paragraphs from the petitioner's opening, a six-line colloquy between the court and prosecuting counsel, a portion of the examination of the third of the Government's first three witnesses, and the entire transcript of the testimony of the fourth witness. The latter two items are set out in the affidavit of the Assistant United States Attorney in opposition to petitioner's motion to dismiss the information following the mistrial.

constitute double jeopardy. The motion was denied and he was retried in April. He now attacks the conviction in which the second trial resulted.

In this state of the record, we are not required to pass upon the broad contentions pressed, respectively, by counsel for petitioner and for the Government. The case is one in which, viewing it most favorably to petitioner, the mistrial order upon which his claim of jeopardy is based was found neither apparently justified nor clearly erroneous by the Court of Appeals in its review of a cold record. What that court did find and what is unquestionable is that the order was the product of the trial judge's extreme solicitude—an over-eager solicitude, it may be—in favor of the accused.

Since 1824 it has been settled law in this Court that "The double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade* v. *Hunter*, 336 U. S. 684, 688. *United States* v. *Perez*, 9 Wheat. 579; *Thompson* v. *United States*, 155 U. S. 271; *Keerl* v. *Montana*, 213 U. S. 135, 137–138; see *Ex parte Lange*, 18 Wall. 163, 173–174; *Green* v. *United States*, 355 U. S. 184, 188. Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263; *Dreyer* v. *Illinois*, 187 U. S. 71, 85–86. It is also clear that "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best

served . . . ." *Brock* v. *North Carolina*, 344 U. S. 424, 427,[5] and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. See *Lovato* v. *New Mexico*, 242 U. S. 199; cf. *Wade* v. *Hunter*, *supra*. In the *Perez* case, the authoritative starting point of our law in this field, Mr. Justice Story, for a unanimous Court, thus stated the principles which have since guided the federal courts in their application of the concept of double jeopardy to situations giving rise to mistrials:

> ". . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office . . . ." 9 Wheat., at 580.

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[5] *Brock* v. *North Carolina* was a state prosecution and therefore arose, of course, under the Due Process Clause of the Fourteenth Amendment. The passage quoted from *Brock*, however, related to the application in federal prosecutions of the double jeopardy provision of the Fifth.

The present case falls within these broad considerations. Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Charybdis and Scylla. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 486.—October Term, 1960.

Dante Edward Gori, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1961.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Black and Mr. Justice Brennan concur, dissenting.

The place one comes out, when faced with the problem of this case, depends largely on where one starts.

Today the Court phrases the problem in terms of whether a mistrial has been granted "to help the prosecution" on the one hand or "in the sole interest of the defendant" on the other. The former is plainly in violation of the provision of the Fifth Amendment that no person shall ". . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." That was what we said in *Green* v. *United States*, 355 U. S. 184, 188. But not until today, I believe, have we ever intimated that a mistrial ordered "in the sole interest of the defendant" was no bar to a second trial where the mistrial was not ordered at the request of the defendant or with his consent. Yet that is the situation presented here, for the Court of Appeals found that the trial judge "was acting according to his convictions in protecting the rights of the accused." [1]

There are occasions where a second trial may be had, although the jury which was impanelled for the first trial

[1] In this case the trial judge said:

"I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney."

was discharged without reaching a verdict and without the defendant's consent. Mistrial because the jury was unable to agree is the classic example; and that was the critical circumstance in *United States* v. *Perez*, 9 Wheat. 515; *Logan* v. *United States*, 144 U. S. 263; *Dreyer* v. *Illinois*, 187 U. S. 71; *Moss* v. *Glenn*, 189 U. S. 506; *Keerl* v. *Montana*, 213 U. S. 135. Tactical situations of an army in the field have been held to justify the withdrawal of a court-martial proceeding and the institution of another one in calmer days. *Wade* v. *Hunter*, 336 U. S. 684. Discovery by the judge during the trial that "one or more members of a jury might be biased against the Government or the defendant" has been held to warrant discharge of the jury and direction of a new trial. *Id.*, 689. And see *Simmons* v. *United States*, 142 U. S. 148; *Thompson* v. *United States*, 155 U. S. 271. That is to say, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." [2] *Wade* v. *Hunter*, *supra*, 689. While the matter is said to be in the sound discretion of the trial court, that discretion has some guidelines—"a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Id.*, 690.

To date these exceptions have been narrowly confined. Once a jury has been impanelled and sworn, jeopardy attaches and a subsequent prosecution is barred, if a mistrial is ordered—absent a showing of imperious neces-

[2] In *Lovato* v. *New Mexico*, 242 U. S. 199, 201, the jury was dismissed so that the defendant could be arraigned and could plead; and it was then impanelled again. The case stands for no more than the settled proposition that "a mere irregularity of procedure" does not always amount to double jeopardy.

sity.[3] As stated by Mr. Justice Story in *United States* v. *Coolidge*, 25 Fed. Cas. No. 14, 858, the discretion is to be exercised "only in very extraordinary and striking circumstances."

That is my starting point. I read the Double Jeopardy Clause as applying a strict standard. "The prohibition is not against being twice punished; but against being twice put in jeopardy." *United States* v. *Ball*, 163 U. S. 662, 669. It is designed to help equalize the position of government and the individual, to discourage abusive use of the awesome power of society. Once a trial starts jeopardy attaches. The prosecution must stand or fall on

[3] See *United States* v. *Watson*, 28 Fed. Cas. 499; *United States* v. *Whitlow*, 110 F. Supp. 874; *Ex parte Ulrich*, 42 F. 587.

In state cases, a second prosecution has been barred where the jury was discharged through the trial judge's misconstruction of the law. *Jackson* v. *Superior Court*, 10 Cal. 2d 350, 74 P. 2d 243, 113 A. L. R. 1422; *State* v. *Spayde*, 110 Iowa 726, 80 N. W. 1058; *State* v. *Callendine*, 8 Iowa 288; *Lillard* v. *Commonwealth*, 267 S. W. 2d 712 (Ky.); *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606; *Robinson* v. *Commonwealth*, 88 Ky. 386, 11 S. W. 210; *Williams* v. *Commonwealth*, 78 Ky. 93; *Yarbrough* v. *State*, 90 Okla. Cr. 74, 210 P. 2d 375; *Loyd* v. *State*, 6 Okla. Cr. 76; 116 P. 959.

Where the trial judge has made a mistake in concluding that the jury was illegally impanelled, or biased, a second prosecution has been barred. *Whitmore* v. *State*, 43 Ark. 271; *Gillespie* v. *State*, 168 *Ind.* 298, 80 N. E. 129; *O'Brien* v. *Commonwealth*, 72 Ky. (9 Bush.) 333; *People* v. *Parker*, 145 Mich. 488, 108 N. W. 999; *State* v. *Nelson*, 19 R. I. 467; *State* v. *M'Kee*, 17 S. C. L. (1 Bail.) 651, 21 Am. Dec. 499; *Tomassen* v. *State*, 112 Tenn. 596, 79 S. W. 802. See also *Hilands* v. *Commonwealth*, 111 Pa. St. 1, 2 A. 70, 56 Am. Rep. 235 as limited by *Commonwealth* v. *Simpson*, 310 Pa. St. 380, 165 A. 498. Cf. *Maden* v. *Emmons*, 83 Ind. 331.

The accused has also been discharged where the trial judge erred in his estimate of the prejudicial quality of the remarks made by counsel for the accused, *Armentrout* v. *State*, 214 Ind. 273, 15 N. E. 2d 363, or of the jurors drinking beer which had been brought in by the bailiff. *State* v. *Leunig*, 42 Ind. 541.

its performance at the trial. I do not see how a mistrial directed because the prosecutor has no witnesses is different from a mistrial directed because the prosecutor abuses his office and is guilty of misconduct. In neither is there a breakdown in judicial machinery such as happens when the judge is stricken, or a juror has been discovered to be disqualified to sit, or when it is impossible or impractical to hold a trial at the time and place set. The question is not, as the Court of Appeals thought, whether a defendant is "to receive absolution for his crime." 282 F. 2d 43, 50. The policy of the Bill of Rights is to make rare indeed the occasions when the citizens can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government.